

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Pork Antitrust
Litigation

File No. 18CV1776
19CV1578 & 19CV2723
(JRT/HB)

Minneapolis, Minnesota
May 13, 2020
2:08 P.M.

BEFORE THE HONORABLE CHIEF JUDGE JOHN R. TUNHEIM
UNITED STATES DISTRICT COURT JUDGE
(MOTIONS HEARING VIA VIDEO CONFERENCE)

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2:08 P.M.

(In open court via video conference.)

THE COURT: All right. I believe we're ready to begin. Good afternoon, everyone. This is Civil Case Number 18-1776, Wanda Duryea, et al, versus Agri Stats, Inc., et al; Civil Case Number 19-1578, Winn-Dixie Stores versus Agri Stats, Inc.; and Civil Case 19-2723, the Commonwealth of Puerto Rico versus Agri Stats, Inc., et al.

We're going to go through and have counsel note appearances by Ms. Arent-Zachary. Go ahead.

THE CLERK: Okay. Starting with plaintiffs, I will read your name, and just say present or here or some variation. In the lead case, we have Alec Finley. Not hearing you. You may be muted.

UNKNOWN SPEAKER: Ma'am, may I break in? I'm not hearing Judge Tunheim. I don't know if any of us on the bridge are.

THE CLERK: That's unfortunate, but you can hear me fine? Oh, they can't hear us. Why can't they hear us? Oh, wait.

MR. HEDLUND: I wasn't hearing, either. It looks like it's maybe on mute.

THE CLERK: We are -- you're muted? We're going to go off the record.

1 **(Off-the-record discussion.)**

2
3 **(In open court via video conference.)**

4 THE COURT: All right. I believe we're now on.
5 Again, let me apologize for looking like I'm looking off
6 into the distance. It's the camera angle in the courtroom
7 for video conference that is causing this. I actually am
8 looking directly at you with the big screen here in front
9 of me.

10 So can you hear me okay?

11 MS. MILLER: Yes, Your Honor.

12 THE COURT: Okay. All right. We'll start again
13 here. This is Civil Case Number 18-1776, Wanda Duryea, et
14 al, versus Agri Stats, Inc., et al; and we also have Civil
15 Case Number 19-1578, Winn-Dixie Stores, Inc., versus Agri
16 Stats, Inc.; and we have Civil Case Number 19-2723, the
17 Commonwealth of Puerto Rico versus Agri Stats, Inc., and
18 there are, of course, are other plaintiffs and defendants
19 other than the initial ones listed in each case.

20 We're going to go through and have each counsel
21 note their appearances. Rather than have you do it
22 individually, I am going to have Ms. Arent-Zachary say your
23 name, and if you would quickly unmute and say present, then
24 we will get everyone's name down for the record.

25 THE CLERK: Okay. I'll start again. On the

1 plaintiffs' side, Alec Finley?

2 MR. FINLEY: Alec Finley [indiscernible due to
3 audio interruption] for plaintiffs.

4 THE COURT: Mr. Finley, the ear buds do not work
5 well with this media.

6 MR. FINLEY: Understood. I will switch to
7 headphones or earphones.

8 THE COURT: Thank you. Daniel Hedlund?

9 MR. HEDLUND: Here. Good afternoon.

10 THE CLERK: Steve Berman? I believe Mr. Berman
11 is with us. If you are speaking, you may be muted.

12 THE COURT: He's muted.

13 THE CLERK: Mr. Berman, I see that you are muted
14 but you --

15 MR. BERMAN: Yes, I'm here. Sorry.

16 THE CLERK: It's hard to get used to this. Shana
17 Scarlett?

18 THE COURT: She is there.

19 THE CLERK: Yeah, you are also muted.

20 MS. SCARLETT: Here. Can you hear me now?

21 THE CLERK: Yes. Barely.

22 Okay. Brian Clark?

23 MR. CLARK: Yes. Good afternoon.

24 THE CLERK: W. J. Bruckner?

25 MR. BRUCKNER: Yes. Joe Bruckner, good

1 afternoon, everybody.

2 THE CLERK: Bobby Pouya.

3 MR. POUYA: Present.

4 THE CLERK: And I think that's -- wait for
5 plaintiffs, Patrick Ahern?

6 MR. AHERN: Present.

7 THE CLERK: And Kyle Bates.

8 MR. BATES: Here. Good afternoon, Your Honor.

9 THE CLERK: And I believe that's everyone for
10 plaintiffs. Is there anyone I missed?

11 Okay. For defendants, this is in order by firm.
12 Tiffany Rider Rohrbaugh?

13 MS. ROHRBAUGH: Present.

14 THE CLERK: Jaime Stilson.

15 MS. STILSON: Jaime Stilson, and I'm here.

16 THE CLERK: It's Jaime.

17 MR. STILSON: Yeah.

18 THE CLERK: Richard Duncan?

19 MR. DUNCAN: Yes. Present. Good afternoon.

20 THE CLERK: Thank you. Richard Parker?

21 MR. PARKER: Present. Good afternoon.

22 THE CLERK: Brian Robison?

23 MR. ROBISON: Present. Good afternoon.

24 THE CLERK: Justin Bernick?

25 MR. BERNICK: Here.

1 THE CLERK: William Monts?
2 MR. MONTS: Good afternoon. Here.
3 THE CLERK: Gene Summerlin?
4 MR. SUMMERLIN: Here.
5 THE CLERK: Christa Cottrell.
6 MS. COTTRELL: Yep. I'm here.
7 THE CLERK: Christina Briesacher?
8 MS. BRIESACHER: Yes. Briesacher. I'm present.
9 THE CLERK: Oh, that wasn't too bad.
10 Sami Rashid?
11 MR. RASHID: Present.
12 THE CLERK: Stephen Neuwirth?
13 MR. NEUWIRTH: Present. Thank you.
14 THE CLERK: Donald Heeman?
15 MR. HEEMAN: Yes. Good afternoon.
16 THE CLERK: Peter Schwingler?
17 MR. SCHWINGLER: Present.
18 THE CLERK: And William Greene?
19 MR. GREENE: Present. Good afternoon.
20 THE CLERK: Did I miss anyone for defendants?
21 MS. MILLER: Yes. Your Honor, Britt Miller,
22 Mayer Brown, on behalf of IPC, and on the audio line is my
23 colleague William Stallings.
24 THE CLERK: I see. I did miss you, Ms. Miller.
25 Thank you.

1 MS. MILLER: No problem.

2 THE COURT: All right. Did we get everybody?

3 All right. The Court has read through the briefs
4 that have been filed in this matter in preparation for this
5 hearing. Thank you all for agreeing to participate by Zoom
6 today so that we can get this motion heard or these motions
7 heard while we are in this slowdown caused by the pandemic.

8 So I imagine you have a view as to who is going
9 first and an order here, and I will accede to how you wish
10 to proceed with argument on the motions.

11 MR. NEUWIRTH: Good afternoon, Your Honor. This
12 is Stephen Neuwirth from Quinn Emanuel, and I have been
13 designated by the defendants to speak concerning the
14 sufficiency of the federal Sherman Act claims, and I will
15 be followed by Mr. Parker who will be addressing the
16 federal statute of limitations issue.

17 And then he will be followed by Mr. Duncan who
18 will be addressing the other items that Your Honor had
19 identified that you wanted the parties to address today,
20 and if it is still Your Honor's intention to have
21 approximately a three-hour hearing, it would be our
22 intention to reserve approximately half an hour for
23 rebuttal after the plaintiffs speak, if that would please
24 the Court.

25 THE COURT: That's fine.

1 MR. NEUWIRTH: Thank you very much, Your Honor.

2 So turning to the sufficiency of the claims, I
3 believe we delivered to the Court for Your Honor a binder
4 with certain demonstratives that we were planning to use in
5 today's hearing, and it's a binder that has the cover
6 Defendants' Hearing Binder Regarding Sufficiency of the
7 Federal Sherman Act Claims.

8 THE COURT: Yes.

9 MR. NEUWIRTH: And I will be referring to that
10 during the argument. In fact we begin at the very
11 beginning of tab 1 in that binder, because as Your Honor
12 knows, you dismissed the complaint that had originally been
13 filed in this case, and as highlighted behind tab 1 when
14 you did so, you did so principally on the ground that the
15 plaintiffs have not adequately pleaded parallel conduct
16 sufficient to support an inference of conspiracy.

17 And you highlighted in your opinion that what the
18 original complaints lacked was specific information
19 regarding each defendant concerning -- and you said that
20 you had no basis to analyze which, how many or when any of
21 the individual defendants may have affirmatively acted to
22 reduce the supply of pork, and you noted that that
23 information is vital to pleading parallel conduct.

24 And you also noted that the complaints lacked any
25 of the type of specific allegations that would enable the

1 Court to determine whether defendants' alleged production
2 cuts were temporally proximate, and you then gave the
3 plaintiffs 90 days plus to submit amended complaints that
4 were meant to address this deficiency. Unfortunately, the
5 new complaints that the plaintiffs have filed do not solve
6 this fatal flaw whatsoever.

7 In fact, as we see behind tab 5, when you granted
8 plaintiffs leave to amend, you expressly said it was so
9 that they could put in specific allegations that plausibly
10 establish that the individual defendants decreased their
11 own production of pork in parallel with their competitors,
12 but that did not happen at all.

13 As we see behind tab 6, the new complaints, like
14 the old complaints, don't allege any purported production
15 cuts during half of the years of this alleged conspiracy.
16 They don't allege that two of the defendants, IPC and
17 Seaboard, ever engaged in any production cut during the
18 entire ten years of the conspiracy.

19 As three of the other defendants, JBS, Clemens
20 and Triumph, they allege that each undertook only a single
21 production cut during the entire period of the conspiracy,
22 and they don't allege that Seaboard and Triumph engaged in
23 any production cuts after the first year of the purported
24 conspiracy that supposedly lasted ten years.

25 The new complaints in this respect are exactly

1 like the ones that you dismissed, and if we look behind tab
2 9, what we see is that the steps that the plaintiffs claim
3 to have taken to fix the problem really are just a
4 repetition of exactly what you found insufficient the first
5 time around.

6 The prior complaints relied on generalized public
7 statements by the defendants talking about the marketplace.
8 You said those were insufficient, and those same statements
9 and others just like them are in the new complaints. The
10 plaintiffs in their original complaints had quotes from
11 third parties who weren't even working at the defendants'
12 making observations about the market. Those were
13 insufficient.

14 Those same observations appear in the amended
15 complaint. We have the problem of group pleading where the
16 plaintiffs speak in generalities about all of the
17 defendants or the market as a whole. No way to know what
18 any defendant did. The same thing appears in the new
19 complaint, and once again, the plaintiffs when they put
20 forth data rely on aggregated industry data which again
21 gives you no way to know what any defendant did.

22 And this was after being told they needed
23 specificity and being given over 90 days to provide it, and
24 I would respectfully submit that when the plaintiffs get up
25 today and show you the time line that is in their

1 demonstratives, you will see that every category of
2 problematic allegation that I just went over is in that
3 time line. This is what the plaintiffs are relying on.

4 Now, what the plaintiffs have also tried to do in
5 their opposition papers to address this problem, Your
6 Honor, is instead of looking at the conspiracy as a whole,
7 they have asked Your Honor to consider subgroups of years,
8 to look at just two- or three-year periods at a time where
9 they claim there are clusters of activity.

10 Well, just by way of background, there are a
11 couple of problems with this. First, as we see behind tab
12 13 is that in an effort to put together one of these
13 smaller periods of time, instead of starting the conspiracy
14 period in 2009, the plaintiffs now want you to look at the
15 period 2008 to 2010, and they want to include what they
16 allege are cuts in supply during 2008.

17 The reason that doesn't work in this case, Your
18 Honor, is because the complaints from the outset, the
19 original complaints and the new complaints, are so heavily
20 invested in saying that this conspiracy started in 2009.

21 In your original opinion at page two as we note
22 here, Your Honor recognized that the original complaints
23 had repeatedly alleged that starting in 2009 defendants
24 began to discretely conspire with one another.

25 THE COURT: Mr. Neuwirth, doesn't the complaint

1 indicate the conspiracy may have begun earlier? I think
2 there is an allegation in there, and so why wouldn't that
3 evidence be possibly relevant?

4 MR. NEUWIRTH: Well, Your Honor, to the extent
5 that there are lines like that in the amended complaint, we
6 would submit that they cannot be reconciled with the other
7 allegations of the complaint that are meant to explain how
8 this [indiscernible due to audio malfunction] --

9 THE CLERK: You are cutting out, Mr. Neuwirth.

10 COURT REPORTER: Mr. Neuwirth, this is the court
11 reporter. I am going to repeat up to when you cut out,
12 what I have up to that point, and then you can continue
13 from there. Okay?

14 MR. NEUWIRTH: Thank you.

15 COURT REPORTER: What I have is, "Submit that
16 they cannot be reconciled with the other allegations of the
17 complaint that are meant to explain how this" --

18 MR. NEUWIRTH: Thank you.

19 How this conspiracy worked.

20 Can you hear me now, madam court reporter?

21 COURT REPORTER: Yes, sir. Thank you.

22 MR. NEUWIRTH: Thank you very much.

23 And, Your Honor, as we see here what the
24 complaints say is that in 2009 the defendants changed their
25 behavior, that 2009 marked a drastic change from the period

1 prior to the conspiracy. In fact, these complaints
2 expressly allege that prior to 2009, total pork production
3 increased steadily year to year spiking in 2008, and they
4 also allege that it was only in April of 2009 that the
5 exchange of information using Agri Stats that they complain
6 about began.

7 It says right here, in April of 2009 Greg Bilbrey
8 of Agri Stats invited swine integrators to design and
9 operate their own benchmarking effort. So while Your Honor
10 is correct [indiscernible due to audio malfunction].

11 THE CLERK: Mr. Neuwirth, your audio is breaking
12 up again.

13 MR. NEUWIRTH: Okay. I apologize. I have not
14 had this problem before.

15 THE CLERK: It's fine now. It was momentary, I
16 think.

17 THE COURT: I think the issue is, when you speed
18 up talking sometimes the words get mixed up together. So
19 just speak slowly. It will be just fine.

20 MR. NEUWIRTH: Thank you very much. I will do
21 that.

22 And as I was just noting, I hope it came through,
23 the complaint expressed that it was in April 2009 that the
24 complaints say the defendants were invited to start using
25 Agri Stats for the purposes that the plaintiffs allege were

1 inappropriate.

2 And so, Your Honor, while it is true that the
3 complaints have some lines interspersed within them
4 suggesting that maybe this started in 2008, that is not
5 plausible relative to these other allegations saying that
6 pork production increased steadily [indiscernible due to
7 audio malfunction] in 2008, but it wasn't until 2009 that
8 the defendants changed their behavior.

9 But even assuming that you could include the 2008
10 data, there is another problem, which is highlighted behind
11 tab 14, which is that these conspiracies that Your Honor
12 also noted in [indiscernible due to audio malfunction].

13 THE CLERK: You're breaking up Mr. Neuwirth. I
14 think part of it is while you're speaking, you seem to be
15 kind of moving back and forth a little bit when you're
16 looking down. I'm sorry to be so nitpicky, but that seems
17 to be when you're cutting out.

18 MR. NEUWIRTH: Okay. I appreciate that. If this
19 happens again, I can switch to a different device, but I
20 hope this will work, and please thank you for graciously
21 letting me know about this.

22 Another problem, Your Honor, is that, as we see
23 behind tab 14, the plaintiffs' allegation here is that
24 there was a scheme to limit the supply of hogs. However,
25 the plaintiffs themselves now have to acknowledge, as you

1 see behind tab 15, that of all the defendants only three of
2 them were alleged to have any significant hog production at
3 all, and what the plaintiffs say in their complaint is
4 significant is just getting 5 percent of their hog supply
5 from their own production.

6 So the notion that these defendants, almost the
7 majority of whom didn't even produce their own hogs, would
8 have wanted to raise the price of hogs by limiting supply
9 is completely implausible because why would these
10 defendants have wanted to raise their number one cost
11 input. There is no explanation of that in the complaints
12 even though we have been raising this from the outset.

13 But turning to the specific clusters that
14 supposedly show parallel conduct, as we see behind tab 16,
15 for the years 2008 to 2010, four of the eight pork
16 processing defendants, that is Clemens, IPC, JBS and
17 Seaboard, are not alleged to have done anything during the
18 years 2008 to 2010.

19 Smithfield is alleged to have cut supply, but the
20 complaints acknowledge that that started in February 2008,
21 eleven months before the complaints as we saw said that
22 everything changed and during a year that the complaints
23 say was a year when supply spiked.

24 Triumph is only alleged to have cut some hog
25 supply once during this period, and plaintiffs only allege

1 that Hormel cut sows by an unknown amount at some
2 unspecified time in 2008 and had tonnage reductions of some
3 unspecified time in 2009 and similar allegations about
4 Tyson. So during this period 2008 to 2010, we have nothing
5 that could remotely constitute parallel conduct.

6 As we see behind tab 18, looking at the years
7 2011 to 2012, which is the next period that the plaintiffs
8 ask us to look at, the plaintiffs don't even allege that
9 anybody did anything to reduce supply during 2012, and in
10 2011, the -- in 2011, it's only alleged a few suppliers
11 made cuts.

12 Now in looking at the years 2008 to 2010, it's
13 critical that on top of the absence of allegations, the
14 plaintiffs also disregard the compelling alternative
15 explanation that their own complaints identify for why
16 there might have been some reductions in supply. As we see
17 behind tab 33, the complaints themselves recognize that
18 this was the period of the Great Recession, which had a
19 huge impact on the economy and demand for goods.

20 It was also a period when there was a swine flu
21 epidemic, and it was also a period of higher corn prices.
22 All of this is reflected in the complaint itself, and we
23 have all the citations here for where that occurred. So
24 2008 to 2010 is a period when not only do they have only
25 the sparsest allegations among all the defendants of any

1 supply cuts, but there are major events like the Great
2 Recession and swine flu epidemic that clearly have to be
3 accounted for and even greater weight to the absence of
4 parallel conduct allegations.

5 We saw how little there is for 2011 and 2012, and
6 I think it's critical as well that if you look behind tab
7 19, what we see is what a tremendous absence of evidence
8 there was that the plaintiffs felt compelled in their
9 opposition brief to assert that Indiana Packers would
10 reduce pork processing in 2012.

11 After a letter was written to the plaintiffs
12 pointing out that that allegation doesn't even appear in
13 the complaint, the plaintiffs conceded in an e-mail they
14 sent that there were no supply cuts by IPC in 2012, meaning
15 there were no cuts by any supplier that year.

16 Turning [indiscernible due to audio malfunction]
17 the period when the plaintiffs say that there was any
18 concerted effort to decrease supply, if we look behind tab
19 20, the plaintiffs now concede that 2013 was a year when
20 there was a major pig virus that affected production, and
21 they only have limited allegations in that year in any
22 event about three of the defendants, none of which
23 indicates any parallel conduct at all.

24 For 2014 as we see behind tab 21, that was a year
25 when there was deadly pig disease. Your Honor recognized

1 that in your first order and said that the plaintiffs
2 acknowledge that that was what caused the dip in production
3 that year, and as we see behind tab 22 for the years 2015
4 and 2016, plaintiffs cite only a single alleged supply
5 reduction during that period.

6 And it's just an allegation that JBS, one of the
7 companies that isn't even alleged to be a significant sow
8 producer, reduced the number of sows that it produced that
9 year. So looking over the course of the conspiracy and
10 even looking at the clusters of time that the plaintiffs
11 have identified, the very problem that Your Honor
12 recognized with the original complaints still exist.

13 Now, the complaint also has other information
14 which highlights the lack of plausibility. As we see
15 behind tab 23, Your Honor can and should consider the full
16 text of documents that are embraced by the amended
17 complaints. The Supreme Court said that in *Twombly*, and
18 many other courts have said that since then, including Your
19 Honor in the *Region Multiple Listing Service of Minnesota*
20 case from 2013.

21 And as we see behind tab 24, one of the documents
22 that the complaints now rely on heavily are Pork
23 Powerhouses report including a report from 2009, but that
24 report shows that only three of the eight defendants
25 reduced sow levels from 2008 levels, and they did so in

1 nonparallel amount.

2 It shows that one of the defendants, Clemens,
3 actually increased its sow inventory, its sow inventory
4 from 2008 levels, that two of the defendants, Seaboard and
5 Hormel, didn't reduce their sow inventories at all, and two
6 of the remaining defendants are not even listed. So the
7 document that they include undermines the allegations in
8 their complaint.

9 Critically as we see behind tab 25, what these
10 Pork Powerhouse reports also show is a total lack of
11 parallel conduct. These are data points from those
12 reports. We put it into our opposition papers, and the
13 plaintiffs did not dispute its accuracy. This shows what
14 happened for each of the defendants, and it's true, as we
15 can see on the top line, that Smithfield did have a drop in
16 output during the years 2008 to 2010, as Your Honor noted
17 in your original opinion.

18 But these Pork Powerhouse reports only confirm
19 what Your Honor also found, which was that there was no
20 evidence that what Smithfield did was in coordination with
21 any other defendant. There is no other defendant in this
22 chart which had a reduction in output during this period,
23 and if we look at the entire period from 2009 forward, most
24 of the defendants are higher at the end of that period than
25 they were at the beginning.

1 So the very thing that Your Honor found in your
2 original decision is highlighted in the documents that have
3 now been put and cited in the amended complaint. We also
4 note that behind tab 26, it is clear from the new
5 complaints and the charts that are in them that only three
6 of the defendants as noted earlier have any significant hog
7 production of their own.

8 And again as we noted, it's implausible that
9 there would have been any sort of conspiracy among these
10 defendants to reduce the supply of hogs given that fact,
11 and then finally, if we look behind tab 28, and this is
12 also figure 7 of the direct purchaser complaint paragraph
13 120, it shows that hog production increased significantly
14 during the alleged conspiracy.

15 It shows that from the period 2009 through 2017,
16 which is the period that the complaints cover, hog supply
17 actually went up, and in the absence of any allegations of
18 parallel conduct, this chart in the complaint only
19 highlights why there are no allegations of parallel conduct
20 because had there been parallel conduct to reduce supply,
21 this increase in supply wouldn't have been possible.

22 Now, perhaps to, perhaps to find another way to
23 salvage this case, the indirect purchasers have come up
24 with a new allegation. They have now added in the IPP
25 complaint only an information exchange theory of liability

1 which they say should be governed by the rule of reason,
2 Your Honor, and as we see behind tab 41, essentially what
3 they said is that Agri Stats served as an information
4 exchange that allowed the defendants to compare and match
5 each other's pricing. That is the allegation.

6 Unfortunately, the complaints show that this
7 cannot work. If we look behind tab 42, what we see is that
8 the cases that have found this type of information exchange
9 claim to even be possible have always highlighted that it
10 had to be focused on the exchange of current or future
11 price information, which makes sense because only current
12 or future price information could be used as a means to set
13 prices for the present time or the future.

14 However, as we see behind tab 43, the complaints
15 themselves recognize that the data exchange here was weeks
16 or months old. The quotes from the complaints talk about
17 the data being six weeks old or three months old or even
18 two to six weeks old.

19 Now the plaintiffs may try to argue that there is
20 no reason why that type of data wouldn't be relevant in
21 general. However, in this industry as we see behind tab
22 44, the complaints themselves show that prices vary
23 constantly. Not only do they vary constantly, they vary
24 daily, and the USDA regulations that are published at 7
25 C.F.R. Section 59 as we quote on tab 44 show that pork

1 processors are required to report their prices twice a day
2 to the USDA, and the USDA then aggregates and publishes
3 those prices on the same day.

4 So in this industry, pricing information which is
5 weeks or months old cannot satisfy the criteria for current
6 pricing, and as we highlight on tabs 45 and 46 and 47, I
7 won't go through it now, but every single one of the cases
8 that the plaintiffs cite, including *Todd v. Exxon* and the
9 very recent *Haff Poultry versus Tyson* decision, a decision
10 that a judge read into the record that they included with
11 their papers, those cases all expressly dealt with current
12 and sometimes future information.

13 That is a quote from the *Haff Poultry* case, which
14 wasn't even a case concerning supply. It had to do with
15 payments to growers of broiler chickens, and so what all of
16 these cases show is that an information exchange theory can
17 only work if what is being exchanged has the possibility of
18 affecting prices, and in this industry, the complaints
19 themselves show that that cannot work.

20 The complaints also have no allegations
21 whatsoever that would enable the Court to determine how any
22 of this pricing information was used to affect any
23 particular price. You can read these complaints cover to
24 cover. There is not one allegation connecting any
25 particular exchange of information to any change in a price

1 by any defendant.

2 And I would respectfully ask Your Honor to turn
3 behind tab 51 because the plaintiffs' demonstratives now
4 point to a chart, which I should note is also in the
5 original complaint, which they say highlights how you can
6 see that there was an effect on pricing.

7 However, this is completely aggregated data that
8 Your Honor said was not sufficient to show any defendant
9 did anything. It's average spreads for, for hogs and --
10 for hog composites and during the class period and before,
11 and there is no information about any defendant there, no
12 information about any pricing decision.

13 So the plaintiffs can talk all they want about
14 econometric analysis, but there is nothing here that
15 relates to any particular defendant knew anything about
16 pricing based on the information that was supposedly
17 exchanged. So in sum, these new complaints have the exact
18 same problem that the original complaints did, and the time
19 that you gave plaintiffs to fix the complaints does not
20 change the outcome at all.

21 Let me just say very quickly in closing, Your
22 Honor, that the plaintiffs submitted to you this week a
23 supplemental filing referring to an executive order of the
24 President related to production in the current period at
25 different meat packing facilities, and they have

1 highlighted that in their demonstratives for today.

2 It is, we think, shocking and virtually
3 outrageous that the plaintiffs would try to connect a
4 situation concerning the health and safety of the workers
5 in this facility hundreds and maybe thousands of whom come
6 up with the COVID-19 virus and that the companies and the
7 government are trying to address that situation.

8 To suggest that that has anything to do with the
9 allegations in this case or that it in any way solves the
10 problem of the absence of parallel conduct in this
11 complaint, it's really beyond the pale to try to draw that
12 connection and try to exploit the terrible pandemic that
13 our country [indiscernible due to audio malfunction].

14 Thank you very much, Your Honor.

15 THE COURT: Thank you, Mr. Neuwirth.

16 Let's see. Mr. Parker, are you next?

17 MR. PARKER: Yes, Your Honor. Richard Parker
18 from Gibson Dunn, and I will be addressing the statute of
19 limitations issues on behalf of all of the defendants.

20 May it please the Court. Your Honor, what you
21 just heard from Steve Neuwirth was a presentation of all
22 the reasons, all the many reasons, that plaintiffs showed
23 up in this courtroom with too little, too little to state a
24 claim under the Sherman Act. What I'm going to say is that
25 their problem is not just too little, it's too late. Too

1 little too late, both result in dismissal with prejudice we
2 respectfully submit.

3 And let's just start with the basic facts. I
4 submitted a binder for Your Honor with a few slides in
5 there. I'm going to sort of use them generally. If you
6 look at slide one, you will see an outline of my remarks
7 today, subject of course to your questions, but the point
8 I'm making right now is the first point, and that is as
9 Your Honor found last August, the first act that allegedly
10 caused injury to these folks occurred in '09.

11 This case was not filed until '18. That's nine
12 years. The statute, as we all know, is four years, and
13 that is a big problem and we suggest a fatal problem for
14 these plaintiffs. They try to plead their way out of their
15 -- or off the hook of their own tardiness by invoking the
16 fraudulent concealment doctrine, and the problem with their
17 pleading is that there is no fraud, and there is no
18 concealment.

19 That's, that's, that's the threshold problem.
20 There are three elements, of course, to fraudulent
21 concealment. First of all, the fraudulent concealment, and
22 the second one, they were mislead, and third is of course
23 diligence, and the last two I'm leaving to the papers.
24 That's what I'm saying.

25 I just want to look at the threshold issue, which

1 is did we conceal anything, and I suggest, Your Honor, on
2 the state of this record the answer to that question is a
3 resounding no.

4 Your Honor, if you would turn to slide 2, you
5 will see a summary of their claim, and I just want to start
6 with your August order in which you stated aptly that the
7 complaint -- withdrawn -- this alleged conspiracy has two
8 main elements:

9 Number one, of course, are public statements,
10 earnings call statements, suggesting that my client and
11 others were very concerned about losing a lot of money on
12 hogs, very concerned about overproduction of hogs. There
13 is no question, and what the plaintiffs are saying is that
14 those statements are not legitimate responses to investor
15 inquiries, which is what we say.

16 They say we were signaling each other. The
17 problem with that is that in a public signaling case what
18 role can fraudulent concealment have because public
19 signaling is, well, public. It's public. It's not
20 concealed.

21 The other principal aspect of this conspiracy
22 that the other side is claiming here is of course Agri
23 Stats, which they say is a very secretive organization, and
24 Your Honor, I'm not here to say that every Agri Stats
25 report or any of them are publicly available, but what was

1 publicly available indicates that the defendants and Agri
2 Stats were concealing nothing.

3 If you look at the bottom of slide 2, you will
4 see citations to the complaint in which the other side
5 talks about the facts that were out there in 2008, '09,
6 back in the day, as they say, about Agri Stats, and Your
7 Honor summarized those points on page 8 of your August
8 opinion.

9 And so it was not concealed that Agri Stats was
10 out selling benchmarking services to as many pork producers
11 as they possibly could. It was not concealed that
12 benchmarking, of course, involves the exchange of data, and
13 it was not concealed that Agri Stats was telling everybody
14 who would listen that, well, this is about increasing
15 profitability if you use our service. They're marketing
16 their service, and, Your Honor, they're doing it openly
17 which suggests there was no concealment.

18 Now, if you look at sort of the paradigm for
19 fraudulent concealment, you will see as in the *Monosodium*
20 *Glutamate* case -- I hope I am pronouncing that correctly --
21 that there was people who were fixing prices, but they had
22 some elaborate scheme to make it look like business as
23 usual and to cover up the fact that prices were not
24 competition on the merits but were fixed. Then that was
25 exposed, and then the statute started running.

1 Well, here, Your Honor, what is exactly exposed
2 between, you know, the operative events, '10, '11, '12, '13
3 and now. Well, they say it has to do with the Bloomberg
4 chicken article, an article about chickens and about a
5 chicken case, and all it says about pork in there is that
6 guess what, Agri Stats is selling benchmarking services to
7 pork.

8 That's not a revelation, Your Honor. It's not a
9 revelation because it wasn't concealed. It was known. We
10 didn't -- Agri Stats and none of these other defendants
11 covered that up back in the day, back in '09 or '10 or '13,
12 and so the paradigm of fraudulent concealment just doesn't
13 apply here. You can't fraudulently conceal a public
14 signaling case, and you can't fraudulently conceal somebody
15 who is openly selling benchmarking service, and we did not
16 do that, and that complaint is inadequate. Fraudulent
17 concealment does not get these folks off of the tardiness
18 hook.

19 Now, I will move on to the second theory, and
20 that's continuing conspiracy, and just to give context,
21 what that means is is that you have to have a conspiracy.
22 I'm sorry. Go ahead.

23 THE COURT: Let me ask you a question. On the
24 fraudulent concealment, do I have to make a factual finding
25 here in order to determine conclusively that there was no

1 fraudulent concealment? Explain how this is a question of
2 law for me. Okay?

3 MR. PARKER: It's a question on the face of the
4 complaint. It's very clear in the Eighth Circuit that if
5 the face of the complaint shows the statute is not complied
6 with and there is no out, then the complaint could be
7 dismissed under 12(b)(6).

8 What I am suggesting is is that the complaint on
9 its face pleads the use of public statements. That's not
10 concealment, and I have the citations on page 2 of my Power
11 Point or my dec says there was all kinds of information out
12 there about Agri Stats, which means it wasn't concealed
13 because it's out there, and so on the face of this
14 complaint, that's what I'm saying. And I can understand
15 what you're saying about a fact, and that sounds like a
16 trial issue. Absolutely.

17 But here it's in the complaint, and I'm
18 suggesting, Your Honor, a review of the complaint shows a
19 clear violation of the statute and shows that equity in the
20 form of fraudulent concealment can't bail them out because
21 nothing was fraudulent and nothing was concealed. That's
22 what I'm saying. It's a determination on the face of the
23 complaint.

24 THE COURT: I understand. Thank you.

25 MR. PARKER: Okay. Thank you, Your Honor.

1 Moving on to continuing conspiracy, you have to
2 have a conspiracy which -- excuse me -- Mr. Neuwirth just
3 said there wasn't any conspiracy, and then you have to have
4 it continuing, and I'm going to address that issue.

5 Now, if that doctrine applies, that does not mean
6 that these folks can collect damages back to '09 or
7 whenever they're going to start or they're going to try to
8 start. It only means that they get the last four years
9 before the statute -- before the filing and that was four
10 years previous to June of '18, if it applied.

11 THE COURT: So, Mr. Parker, does the four-year
12 time bar apply to a claim for injunctive relief?

13 MR. PARKER: I believe it does, yes.

14 THE COURT: Okay.

15 MR. PARKER: I believe it applies to both, and I
16 would also add on this complaint, there isn't a basis for
17 injunctive relief because of inadequate pleadings of
18 ongoing conduct, and that's about what I'm going to talk
19 about here.

20 To have a conspiracy that, a continuing
21 conspiracy, you have to have a complaint, overt acts plus
22 sales. They make it sound like, well, since we're still
23 selling pork, and I bet you we have sold a lot of pork in
24 the last 45 minutes. Of course we're selling pork, but
25 they are making it sound like that's all you need.

1 What I'm saying is, you need sales plus some kind
2 of an overt act, and they're going to show you a time line
3 in their papers today that talks about the key events, and
4 it's on page 9, 10 and 11 of their dec and the last key
5 event was in '13, which is exactly what I'm saying, that
6 there is nothing bad in this complaint happening after '13;
7 therefore, no overt act; therefore, no continuing
8 conspiracy.

9 And so I would refer the Court, for example, to
10 the -- the plaintiffs love the *Propane I* case, and I think
11 it's very helpful here, but it's helpful for us. In
12 *Propane I*, there was a conspiracy where people were selling
13 cans of propane, but they decided in a conspiratorial
14 fashion not to fill them up, to kind of shave off the top a
15 little bit and then change the same price.

16 That's a conspiracy. That's a conspiracy, and
17 because they were fixing prices and reducing the
18 quantities, and they all agreed on it. So the question
19 was, did it continue? Well, the Court said, look, the can
20 is still not filled, and they're still charging the same
21 price. Looks like it's continuing.

22 So their problem here is our alleged production
23 cut, and I would refer Your Honor to 6, page 6 of my dec
24 here, which refers to a DPP paragraph 51, and, you know, it
25 looks to me like production is going to an all time high.

1 This is not a situation in which the can is not filled and
2 the price is still the same. This is not a situation which
3 anybody is cutting production.

4 They're going to an all time high. They're not
5 just going up. They're really going up. This is like a
6 record. Now, they say, well, look, had it not been for
7 some unspecified conduct going on, you would have had a
8 record and a half or something. That's an astounding
9 statement, and there ought to be some kind of an overt act
10 connected with it, and I suggest, Your Honor, it's just not
11 there.

12 And so going to 10,000 feet, let's just look
13 down. I just want to conclude. You look down on this and
14 you realize that they are late. They are way late because
15 the key events on their own time line took place between
16 '09 and '13, and they're going to get to their time line,
17 but I'll embrace that.

18 I'll take that as an allegation in the complaint,
19 but that means the statutes run, and as I said, Your Honor,
20 the fraudulent concealment paradigm does not apply here,
21 nor is the allegation sufficient to support a continuing
22 conspiracy.

23 So those are the points that I wanted to make,
24 Your Honor, and if -- unless you have questions, I will
25 take my seat or I guess since I'm already sitting, I will

1 just turn the mic over to Mr. Duncan. You know, I have
2 never done this before, Your Honor. This is new for me, so
3 I hope I didn't foul it up too bad.

4 THE COURT: You did just fine, Mr. Parker.

5 Mr. Duncan, your turn.

6 MR. DUNCAN: Thank you, Your Honor. Richard
7 Duncan representing the Hormel Foods defendants.

8 I'm going to address the four state law and
9 Puerto Rico issues that you raised with the parties last
10 Thursday. I am going to try here to project my slides
11 because I think that will make it easier for everyone to
12 follow along through these topics. Okay. Hopefully
13 everyone can see that.

14 So the first question Your Honor raised, we
15 address it in slide 2, is the lack of standing of the
16 commercial indirect plaintiffs to bring claims outside of
17 their state of residence. So there are two pillars
18 supporting our argument that the commercial indirect
19 purchasers lack standing to bring claims based on the law
20 of 20 states, 20 in which they neither reside nor did they
21 purchase any pork product.

22 First, Article III standing is a threshold issue,
23 and it must be present at all stages of federal litigation,
24 and second, standing requires the invasion of a legally
25 protected right, and to invoke federal jurisdiction, a

1 party must state a claim under a statute which affords it
2 protection.

3 Now in this district in the past few years, there
4 have been several class action case decisions that have
5 adhered to the analysis we're providing and have dismissed
6 at the outset --

7 COURT REPORTER: Excuse me, Mr. Duncan. This is
8 the court reporter.

9 Someone has background noise, and you are not
10 muted, and you are bumping out Mr. Duncan when he speaks.

11 THE CLERK: It was someone on the audio. I just
12 muted them.

13 COURT REPORTER: Okay. Thank you.

14 Mr. Duncan, I am going to tell you where I left
15 off. "Now in this district in the past few years, there
16 have been several class action case decisions that have
17 adhered to the analysis we're providing and have dismissed
18 at the outset" --

19 MR. DUNCAN: -- state law claims under the laws
20 of states in which no named plaintiff resides.

21 We have briefed Judge Montgomery's 2014 decision
22 in *Insulate* extensively, but I want to draw the Court's
23 attention today to a couple of other decisions.

24 First, Judge Frank's 2018 decision in McAteer
25 against Target, a personal injury class action, where he

1 hits the issue right on the head. He says, Without a named
2 plaintiff who purchases a product within a given state,
3 there is no one who is harmed, who is legally protected
4 under that state's laws.

5 In our briefing, we also mention a 2015 decision
6 by then Chief Judge Davis called Ferrari against Best Buy,
7 and he goes through not just the decisions in our district,
8 but he goes through a number of them and again comes to the
9 conclusion that a plaintiff cannot state a class claim
10 under the law of a state in which they do not reside.

11 Now, we'll talk about the response here. The
12 commercial indirect purchasers argue that they can avoid
13 addressing this Article III issue now -- excuse me -- the
14 Court can avoid it and Your Honor can look at it down the
15 road at class certification time. That analysis is
16 incorrect under the cases that I have just been discussing,
17 and the plaintiffs really offer no persuasive reason for
18 the Court frankly to avoid doing what it should do, which
19 is address the Article III questions at the outset.

20 The fact that under Eighth Circuit law, the fact
21 that this is a class action does not change the basic
22 standing analysis. In a footnote in the *McAteer* decision,
23 Judge Frank explains I think well why his analysis holds
24 true in the class setting, and he says, To the extent
25 plaintiff posits that putative class members suffered a

1 particular injury in Minnesota, those members are not
2 currently before the Court and any allegation of such
3 injury is mere conjecture, and the same is true here.

4 Unnamed and unknown persons in other states have
5 suffered no cognizable injury, and these plaintiffs can't
6 state a claim for them. In our briefs, we discuss *Amchem*
7 and *Ortiz*. For me the key point there is the massive
8 asbestos settlement context in which those cases arose, and
9 the Supreme Court holds that because class certification
10 was dispositive and plainly erroneous that it wasn't going
11 to reach the Article III issue.

12 But we do note in our reply brief that in *Ortiz*
13 the Supreme Court confirmed, Ordinarily any Article III
14 court must be sure of its own jurisdiction before getting
15 to the merits, and so we're asking the Court to follow that
16 guidance and dismiss the claims for which there is no named
17 plaintiff resident in the particular state.

18 Now absent questions, I'm going to move to the
19 9(b) issue Your Honor raised.

20 THE COURT: That's fine.

21 MR. DUNCAN: Whether 9(b) applies to state law
22 consumer protection claims. So to allege their consumer
23 protection claims, both groups of indirect purchaser
24 plaintiffs make broad allegations of fraud and deception
25 and failure to disclose by defendants, and we have gathered

1 those together in our brief. I think the best Eighth
2 Circuit precedent supporting our argument that such
3 allegations trigger Rule 9(b) is *Olin* against Dakota
4 access. *Olin* came down in December 2018 after this case
5 was first filed, and I'll note after the Southern District
6 of California's 2017 decision, the *Packaged Seafoods* case,
7 that plaintiffs are going to cite to you in their slide
8 dec.

9 So in *Olin* the Eighth Circuit reiterates the
10 direction from the *Streambend* case that whether 9(b)
11 applies is a pleading specific inquiry, and then it follows
12 that direction in *Olin* to note that Rule 9(b) applies to a
13 claim under North Dakota's Consumer Protection Act which
14 requires pleading of fraudulent or deceptive conduct.

15 Here the commercial indirect purchaser plaintiffs
16 plead a claim under the same North Dakota statute at issue
17 in *Olin* that the Court said required application of
18 Rule 9(b). Now, the plaintiffs essentially concede that
19 they don't plead fraud with Rule 9(b) particularity. They
20 assert they don't have to because this is a price fixing
21 case, but again, I would argue *Olin* dispensed with that
22 argument.

23 *Olin* holds that, quote, "A claim may sound in
24 fraud even though it is brought under a statute that also
25 prohibits non-fraudulent conduct." So if you allege fraud,

1 which the plaintiffs do here in spades, or if the statute
2 requires it, either or -- and we cite nine states' laws
3 that require pleading of fraud -- you have to plead the
4 who, what, when, where and how of the supposedly deceptive
5 communication.

6 The plaintiffs don't do that. They simply mouth
7 those words. There is no conduct pled, and for that
8 reason, they don't comply with Rule 9(b), and then finally
9 while we're on this topic, an important point is, that we
10 make in the briefs, but the plaintiffs don't plead any
11 conduct violating the consumer protection statutes other
12 than the conduct that they plead as price fixing.

13 So the consumer protection claims have to be
14 dismissed with prejudice if the antitrust claims fail
15 because there is no further conduct to state a claim with,
16 and that's my conclusion on that subject, and I'll turn to
17 Puerto Rico next.

18 THE COURT: That's fine.

19 MR. DUNCAN: First, whether Puerto Rico has
20 *parens patriae* standing. Pausing for a second, when we
21 received the Court's questions, we understood that this one
22 related to Puerto Rico law, and that is what I will be
23 talking about mostly.

24 There is a federal *parens patriae* provision in
25 the Clayton Act. The Commonwealth doesn't plead it, and I

1 just want to note that the Supreme Court in *Illinois Brick*
2 expressly held that that provision does not permit a *parens*
3 *patriae* action on behalf of indirect purchasers, which is
4 what the Commonwealth of Puerto Rico, those are the people
5 that they are alleging are harmed are indirect purchasers.

6 So I'm going to set that federal issue aside and
7 now just talk about Puerto Rico. So there are two ways in
8 which an attorney general can get standing to sue *parens*
9 *patriae*, either by express statutory authorization or under
10 common law by asserting a quasi sovereign interest.

11 Judge Gelpi in the *Carpenter Company* case that
12 the Commonwealth submitted to the Court as supplemental
13 authority summarizes the law in the first point in that
14 case. He says there is no Commonwealth *parens patriae*
15 statute for antitrust claims.

16 This action by the Commonwealth is not a class
17 action, so there are two other statutes that they mention
18 in their brief that are not relevant to the *parens patriae*
19 analysis in a nonclass action. So under the *Snapp* test,
20 there is no quasi sovereign interest at stake here.

21 So there is an antitrust injury section of the
22 Commonwealth's third amended complaint, and the injury they
23 identify in paragraph 174D is, End user consumers of pork
24 who indirectly purchased pork for personal use paid
25 artificially high prices, and I submit this is an

1 individual injury.

2 It's not a quasi sovereign interest, and in fact
3 I know it's an individual injury because it's exactly the
4 same injury alleged by the individual indirect purchasers
5 in paragraph 257B of their current complaint. The people
6 they say are injured are, End user consumers of pork who
7 indirectly purchase pork for personal use, including
8 plaintiffs, paid artificially inflated prices. It's
9 virtually word for word, the same injury.

10 Finally, Puerto Rico consumers of pork are not
11 being uniquely disadvantaged like the Puerto Rican laborers
12 were in the *Snapp* case. This is not a case about anyone in
13 Puerto Rico suffering some unique injury because of being
14 in Puerto Rico. So our conclusion is, Puerto Rico does not
15 have *parens patriae* standing to bring claims in this
16 lawsuit.

17 Then finally, Your Honor asked whether Puerto
18 Rico has plausibly alleged violations of Sections 259 and
19 260 of the Puerto Rico antitrust act. So turning first to
20 Section 259, which is the unfair and deceptive trade
21 practices provision of Puerto Rico's antitrust act, the
22 first point to bear in mind is that the statute permits
23 only injunctive relief to the attorney general.

24 My next point is that the third amended complaint
25 of the Commonwealth doesn't specify any conduct violating

1 Section 259. In fact, paragraph 190 of that complaint,
2 which is where all of these allegations are, it doesn't
3 even make a conclusory allegation of unfair or deceptive
4 conduct.

5 It recites only the elements for the Sherman Act
6 Section 1 and Section 2 analogues under the Puerto Rico
7 antitrust act and that's Section 258 and 260. So the
8 pleading is deficient on its face, and the claim should be
9 dismissed. At best the Section 259 claim would necessarily
10 fail if the 258 price fixing claim fails.

11 If the Commonwealth hasn't pleaded a price fixing
12 conspiracy, again like the other consumer protection
13 claims, there is no independent conduct alleged that
14 support a Section 259 claim. And then finally under
15 Section 260, the analogue to Sherman Act Section 2, there
16 is no claim stated.

17 First, the complaint pleads the defendants, again
18 in this paragraph 290, excuse me, 190, they plead that
19 defendants, quote, "Monopolized or attempted to monopolize
20 trade or commerce of pork," but that's all it says. It
21 doesn't plead the essential elements of either a
22 monopolization claim or an attempted monopolization claim.

23 Normally there is no pleading that any defendant
24 has anything near the 50 percent market share that the
25 Eighth Circuit in cases going back to *U. S. versus Empire*

1 Gas has required for even an attempted monopolization, much
2 less full monopolization.

3 I think the real reason this is not a
4 monopolization case is because Puerto Rico's complaint does
5 not plead any act of exclusion of competition. Excluding
6 competition to gain a monopoly is the crux of an unlawful
7 monopoly claim, but there are no allegations that any
8 defendant has taken any action to exclude any of its rival
9 pork producers from the market. This is just not a
10 monopolization case.

11 Finally, the Commonwealth's brief in opposition
12 attempts to add what they call a conspiracy to monopolize
13 claim. That isn't procedurally permissible, but if it
14 were, the claim fails for the reason that no conspiracy is
15 alleged, and I like this Virginia court's phrasing of it,
16 Because there can't be a conspiracy to monopolize unless
17 the conspiracy is somehow rationally directed toward the
18 exclusion of competitors.

19 Of course that type of conduct is notably absent
20 from any of these complaints.

21 THE COURT: Mr. Duncan, would it be true that
22 competitors would benefit also from the alleged conspiracy?

23 MR. DUNCAN: Your Honor, yes. I think yes. I
24 think it's the *Matsushita* case which says that in a price
25 fixing conspiracy, the conspirators are taking actions to

1 benefit, that benefit themselves collectively, but that's a
2 Section 1 question. That's the conspiracy question.

3 In Section 2, again the requirement -- and it's
4 in the *American Tobacco* case there -- the requirement is
5 that one competitor is doing something to exclude its rival
6 manufacturers in order to expand its own market power.
7 That is not the same as cartelists getting together to fix
8 price benefits them all.

9 The essence of monopoly is that unilateral
10 expansion of one's business at the expense of one's rivals,
11 and that's not what is pled here. I hope that's, I hope
12 that's clear.

13 THE COURT: Yes. I understand. Thank you.

14 MR. DUNCAN: Thank you, Your Honor. That
15 concludes my portion of the argument [indiscernible due to
16 audio interruption].

17 THE COURT: I'm sorry. We didn't catch the last
18 statement you made, Mr. Duncan.

19 MR. DUNCAN: The last statement? I just said I
20 think that it concludes my portion of the argument and
21 concludes the defense side of the argument at this time.

22 THE COURT: All right. Before we turn to the
23 plaintiffs, we're going to take just a short break, about
24 five minutes or so. So stay connected, and we will be
25 right back.

1 (Recess taken.)

2
3 (In open court via video conference.)

4 THE COURT: All right. Let's proceed with the
5 response.

6 For the plaintiffs, what's the response here for
7 us?

8 THE CLERK: If someone is speaking -- wait.
9 Counsel, we're going to resume. Just a reminder to speak
10 slowly and clearly, and we will interrupt if we have a hard
11 time hearing you.

12 THE COURT: All right. How are we going to
13 proceed for the plaintiffs? What's the plan?

14 MS. SCARLETT: Your Honor, Shana Scarlett from
15 Hagens Berman. I will be speaking to the Sherman Act
16 claims and the 9(b) issue. After that I will be turning it
17 over to Mr. Pouya from the direct purchasers to address the
18 statute of limitations issue.

19 The commercials will then address their standing
20 issues, and lastly, Puerto Rico's counsel will address
21 those issues specific to Puerto Rico.

22 THE COURT: All right. Go ahead, Ms. Scarlett.

23 MS. SCARLETT: Good afternoon, Your Honor. I
24 just want to address two prefatory issues. First,
25 plaintiffs do object to defendants' heavy reliance on

1 documents outside of the pleadings. The chart that they
2 showed you on page 25 of their slide presentation with the
3 sow inventory levels from Pork Powerhouse, essentially what
4 they're doing is converting a motion to dismiss to a motion
5 for summary judgment.

6 These issues are ones that are usually vetted
7 heavily between experts, looking at supply issues, looking
8 at reasons for supply issues and identifying specific
9 amounts related to an overcharge, something inappropriately
10 done on a motion to dismiss.

11 Their chart and many of their suggested alternate
12 explanations do directly contradict the allegations of the
13 complaint.

14 COURT REPORTER: Ms. Scarlett, this is the court
15 reporter. Could you please slow down?

16 MS. SCARLETT: Yes.

17 COURT REPORTER: I left off with, "Their chart
18 and many of their suggested alternate explanations do
19 directly contradict the allegations of the complaint."

20 MS. SCARLETT: The plaintiffs here, however, have
21 requested judicial notice of one very discrete document,
22 the executive order that was recently issued. Plaintiffs
23 believe that that supports the plausibility of the
24 allegations of the complaint, but should this Court choose
25 not to take judicial notice of it, plaintiffs do request

1 leave to amend.

2 We believe that many of the recent events,
3 extreme in their measure, do provide plausibility for the
4 allegations in the complaint, demonstrating that even a
5 small amount of constraint in the supply chain does
6 drastically impact price and supply of pork.

7 Defendants argue to Your Honor that this
8 complaint, that these complaints are the same as the last
9 complaint. Looking at slide 2 of the plaintiffs'
10 presentation, this is not the case. We received your
11 order. We took it to heart. We added allegations best we
12 could at the outset of the case with very limited access to
13 discovery to address the Court's concerns.

14 What did we do? We added additional allegations
15 of parallel conduct, keeping in mind not all these
16 defendants are publicly-traded. Not all of them make
17 public statements. They don't have publicly available data
18 for us to use, but we found what we could, and we have
19 added those allegations to the complaint.

20 The indirect purchaser case has added a rule of
21 reason claim. We did get some amount of limited discovery
22 from Agri Stats in this litigation. It included a small
23 number of Agri Stats reports and a small amount of
24 communications. We added those to the complaint and added
25 a rule of reason claim.

1 We have also added additional economic analysis
2 on the pork market that further supports the allegations of
3 both the per se and the rule of reason claim, and turning
4 to slide 3 of the presentation, these two claims are
5 distinct. There are two distinct claims, although the
6 facts underlying both of them are very strikingly similar.

7 The first claim is a per se allegation of an
8 agreement to destabilize the price of pork, and this claim
9 is shared across all of the plaintiffs' complaints. The
10 second claim is one for rule of reason, that the defendants
11 engaged in an information sharing agreement of information
12 on a highly, highly granular level of the type not normally
13 passed between competitors to impact the supply and price
14 of pork, and that's one that is brought in the indirect
15 purchaser complaint alone.

16 Turning to slide 4, the defendants have, as they
17 have since the beginning of this case and even as recently
18 as their parts of the argument in their slide declaration,
19 attempt to reframe and re-cast this conspiracy. This is
20 not a conspiracy to constrain the supply of pigs. This
21 conspiracy is one to constrain the supply and price of pork
22 being sold into the U. S. market.

23 The vertical integration of some of the
24 defendants, that facilitates this conspiracy, and that's
25 because it removes other players from the market. A

1 limited number of participants means that there are fewer
2 that could come in as new entrants, and it means the
3 coordination amongst conspirators is much easier the fewer
4 that are involved.

5 But the allegation is not that vertical
6 integration is necessary for every defendant, and that's
7 not required to make this conspiracy plausible. Turning to
8 slide 5, Your Honor. Here we have just a small part of the
9 President's recent executive order. In recent days we have
10 seen some extraordinary events.

11 And this executive order was issued in April, and
12 it states, "The closure of a single meat or poultry
13 processing facility can severely disrupt the supply of
14 protein to an entire grocery chain."

15 We're not asking or suggesting that the recent
16 events should be wholly integrated into the complaint.
17 We're just asking this Court to look at whether or not that
18 statement supports the plausibility of the conspiracy here.
19 Defendants have argued that it's implausible, that the
20 supply chain is such that none of the actions that we have
21 alleged could possibly impact the price or supply of pork.
22 We believe the statement in the executive order says
23 otherwise. These small number of defendants wield
24 incredible control over the supply of pork in this country.

25 Turning to slide 6, this is one of the

1 econometric measurements the plaintiffs have made to
2 demonstrate the plausibility of the conspiracy here. We
3 measured the margin between the cost of the hogs being
4 purchased and pork prices, and this analysis shows a
5 divergence prior to the class period and during the class
6 period.

7 It shows that there is a statistical significance
8 at the 0.01 level. There is a divergence here between what
9 it was costing these defendants to either raise or purchase
10 the hogs and what it costs to sell them, and it also
11 demonstrates that costs alone, despite what the defendants
12 have put forward as alternate explanations here, costs
13 alone do not explain the increase in prices of pork during
14 the class period.

15 Slide 7, Your Honor, is a very similar set of
16 measurements. This is for two of the defendants, Tyson and
17 Smithfield. Tyson and Smithfield are both publicly-traded
18 companies. They have an obligation to disclose certain
19 information to their shareholders, and using the
20 information that was disclosed in their Securities and
21 Exchange Commission filings, we perform the same analysis
22 here, and it shows again that the hog cost increase does
23 not explain the increase in price of pork.

24 Turning to slide 8 and just briefly addressing
25 the legal framework required for parallel conduct. What is

1 legally required? You asked the plaintiffs to identify
2 supply cuts with more specificity, to allege cuts that were
3 reasonably proximate in time and value.

4 The law requires, however, that these cuts need
5 not be simultaneous and they need not be lockstep because
6 how could that be? If the law required nearly identical
7 behavior by the defendants, then any defendant would be
8 able to escape liability by merely planning their cuts to
9 have some spacing in time.

10 You could defeat liability by simply saying, you
11 cut now and I will cut two months from now. That simply
12 cannot be that the law is so rigid. What the requirement
13 would be for us to plead every individual supply cut or
14 reduce in capacity of the slaughter facilities would
15 require an enormous amount of access to data.

16 This is data that we can only have access to
17 during discovery. The defendants are not all publicly
18 reported companies, and not all of them are required to
19 disclose this information, but given the public information
20 available, we have put together a time line of events.
21 Turning to --

22 THE COURT: Let me ask you a question. Other
23 than allegations against JBS, were there supply reductions,
24 are there supply reductions alleged after 2011?

25 MS. SCARLETT: Your Honor, turning to slide 11,

1 which has the 2013 time line of events, there is a 3.6
2 percent decrease in sales volume and capacity utilization
3 by Tyson in 2013, Hormel reporting lower sales of its pork
4 products in 2013, and then Seaboard reporting it had lower
5 sales volumes of pork products.

6 And to that end, there is of course slide 12
7 which is on the aggregate showing that the supply in the
8 industry was stabilized at a reduced level than what it
9 would have been but for the complaint, and yes, this is an
10 aggregate slide, but it is based on the information
11 available to the plaintiffs at this time.

12 And the law itself does not require that each
13 defendant cut supply to participant in a conspiracy to
14 stabilize the price and supply of pork. Turning to slide
15 13, it's fundamental to the Sherman Act and the various
16 state acts that were following the Sherman Act that
17 stabilizing itself is prohibited.

18 The defendants need not make an actual cut if the
19 agreement is to stabilize the supply, and there is legions
20 of case law that say this, Your Honor. If we did see, for
21 example, one defendant, let's say Smithfield, cutting
22 supply early in the class period in 2009, what one would
23 expect to see in a competitive market is that the other
24 defendants would then increase their supply to eat up that
25 market share.

1 Turning to slide 14, that's not what we see.
2 Slide 14 shows, and again this is another economic
3 measurement, you know, made by the plaintiffs here in
4 support of the pleading which leads to the inference of the
5 plausibility of the conspiracy. What we see on slide 14 is
6 stabilized market share during the class period.

7 And this is measured against prior to the class
8 period where we see much larger fluctuations in market
9 share. So when Smithfield cut in 2009, you would expect in
10 a competitive market to see other defendants increase their
11 supply to gain market share, and that in fact is not what
12 we see, which supports the inference of a conspiracy here
13 to stabilize supply.

14 The conspiracy is also made more plausible by the
15 various foundational plus factors that this Court has
16 already recognized, but I will just review briefly. Slide
17 15 shows a very heavily consolidated market. There are
18 very few players. We see a simplified structure which
19 facilitates collusion. When you have a small number of
20 players it's much easier to communicate. It's much easier
21 to coordinate. It's much easier to reach an agreement.

22 Four packers controlled roughly 70 percent of the
23 market by 2015. Eight packers exceed 80 percent of the
24 market. This type of heavily consolidated industry almost
25 lends itself to collusion as this Court has recognized. In

1 slide 16, another factor that heavily supports collusion
2 and the inference of plausibility here is that this is a
3 commodity product. Pork is fungible. Bacon is bacon.
4 Pork chops are pork chops.

5 One defendant doesn't sell a branded item that
6 isn't easily interchangeable by another. These defendants
7 compete on price, and when there is an interchangeable
8 product where you compete on price, it is much easier to
9 form a conspiracy to constrain the supply and price of that
10 item.

11 Looking at slide 17, we see public signaling. We
12 see in 2009 Smithfield's CEO saying its cuts were not
13 enough to fix the industry and somebody else has got to do
14 something. We see other producers, Tyson, Hormel and
15 Triumph, each cut production in 2009, and in 2009 we see
16 Smithfield's CEO confirming that he was aware other
17 producers were cutting back.

18 There is other instances of public signaling
19 throughout the complaints. In December 2010, Smithfield's
20 CEO said, Given the information we think we have publicly,
21 plus what we think we know privately, how many they kill,
22 what their processing levels and things like that, they
23 didn't think supply would increase.

24 The defendants had inside information, Your
25 Honor. This case is not limited alone to public signaling

1 because of the existence of the Agri Stats reports which
2 did give the defendants unparalleled access to each other's
3 sensitive business information.

4 Looking at slide 18, we see another plus factor,
5 which is abnormal price movements. This is the pork cutout
6 price. A cutout is the cost paid for the pig versus the
7 price received when you sell that pig. The vertical line
8 in the middle of this table is the beginning of the class
9 period. At one point in time during the class period we
10 have measured a 56 percent increase in price, an incredible
11 abnormal price movement indeed.

12 On average, there was an 18 percent increase in
13 price. The plausibility of the conspiracy is supported by
14 this inference that something happened in 2009, that the
15 defendants entered into an agreement, either a per se
16 horizontal conspiracy to constrain supply or an agreement
17 to exchange information under the rule of reason, which
18 made a break from what had happened previously and that
19 dramatically -- and that dramatically impacted the price of
20 pork in the market.

21 Slide 19 gives you in general the framework for
22 the rule of reason case which I will not belabor here. I'm
23 sure Your Honor is very familiar with it, but in general
24 courts have found that the exchange of current pricing
25 information in a market is anti-competitive, particularly

1 where you have the market structure present that we have
2 here.

3 Slide 20 shows you that each of these defendants
4 knowingly entered into this agreement. Agri Stats reports
5 are very unusual. On the first or second page of it, it
6 gives each defendant a list of the participants in that
7 report. It tells you that your other coconspirators have
8 provided the same sensitive business information that you
9 are providing.

10 Agri Stats in marketing its services also
11 disclosed to the participants who was participating, and
12 you can see that on the slide 20. It would tell each of
13 the defendants who else was participating in giving data,
14 ensuring that those defendants knew their coconspirators
15 were participating.

16 On slide 21, we outline that the plus factors
17 which support the per se conspiracy here also dramatically
18 support the plausibility of a rule of reason claim. The
19 pork market features all of the market structures that the
20 Supreme Court stated in *Container Corp* were likely to make
21 an information exchange anti-competitive.

22 Again, roughly eight players control 80 percent
23 of the market. Pork is fungible. There is inelastic
24 demand. There is price based competition, and there is a
25 trend towards priced based uniformity. Collusion is easier

1 when prices are the only way that product can be
2 differentiated.

3 Defendants have raised questions regarding
4 whether or not the information contained in these Agri
5 Stats reports is current, but of course it's crystal clear
6 that the Department of Justice handbook only allows a safe
7 harbor for pricing information that is older than three
8 months, and that is not the case here.

9 The Agri Stats data is two to six weeks old at
10 best. This information is highly confidential. It is
11 available only to the defendants. It is very one-sided in
12 a marketplace where only the defendants have the access to
13 this pricing and supply information, where other big market
14 players wouldn't, distributors, grocery stores, retail
15 chains, any of those other market participants that are
16 looking to purchase themselves or have no access to this Agri
17 Stats data.

18 And because of its heavily detailed nature,
19 market participants who have seen it, employees of
20 companies, employees of Agri Stats, know how to
21 de-anonymize these reports and are able to discern which
22 competitor places at what place in the report. Of course
23 this is facilitated by the index that appears at the
24 beginning of the report telling each defendant who is
25 participating in that particular sales report or cost

1 report or processing report.

2 We have given the Court examples of the Agri
3 Stats sales reports. Some of them were attached to the
4 complaint. They are very large. We also put screen shots
5 in our complaint of what they might look like. On slide
6 23, there is a brief, just a brief screen shot of an Agri
7 Stats sales report and a column because we just wanted to
8 point out to Your Honor.

9 In that top right-hand column where it says
10 Economic Impact Dollars, what that is telling each
11 coconspirator is the amounts of money that they would make
12 if they raised the price of that particular skew or
13 product -- and it's a very detailed list -- if they raised
14 their price to either the national average or the top 25
15 percent, how much additional money they would make.

16 This is a Tyson report published in October 2009,
17 and it has information through August 2009. This makes
18 this pricing information only six weeks old. It's
19 incredibly detailed. It breaks out for the coconspirators
20 how much more money they could make if they did raise their
21 prices.

22 It's not the type of information that normal
23 competitors would provide to each other. These reports are
24 the only thing that Agri Stats provides. If you look at
25 slide 24, we have here the Agri Stats sales data miner,

1 which also includes detailed pricing information.

2 This, the Agri Stats sales data miner has
3 information by category, by group, by product type and by
4 preparation and gives in this case Tyson -- this document
5 was a Tyson interaction with Agri Stats -- the impact again
6 of the dollar value that that company would make if it
7 raised its prices to the national average, and this
8 information we believe is available to the coconspirators
9 online kind of as you query. This is not something they
10 needed to wait for the report to be disseminated.

11 Turning to slide 25, again emphasizing, this is
12 as current information as one can have when it's only two
13 to six weeks old, when it is as sufficiently detailed as it
14 is and when it calls out for all of the coconspirators the
15 amounts of money that they could make were they to raise
16 their price.

17 It suspends disbelief that the defendant would
18 pay the amounts of money that they do to this private
19 service Agri Stats, provide the detailed data that they do
20 to this company and knowing that it goes to their
21 competitors if they were not using this information to
22 raise their prices and to stabilize supply.

23 And we can take a look at what the defendants
24 actually did, again realizing that the plaintiffs have had
25 only limited discovery, a very small number of documents

1 produced, but even that very small number produced shows us
2 that defendants did use Agri Stats to identify pricing
3 opportunities.

4 One of the bullet points on slide 26 points out
5 for you that Noel White, the future Tyson CEO, in an e-mail
6 that was reported to Agri Stats is insistent that the info
7 be very clear, concise and indicate opps with ease, and the
8 opportunities that he wanted indicated with ease were the
9 opportunities for Tyson to increase the price of its
10 products, and that's the economic impact column that Agri
11 Stats has in all of its economic impact reports.

12 Agri Stats also had regular meetings with the
13 defendants, slide 27. It would travel from defendant to
14 defendant and meet with the executives. This example on
15 slide 27 is between Tyson and Agri Stats, and some of the
16 key take-aways from the meetings were that if they
17 increased the price of certain products there was an
18 opportunity to price up into the top eight.

19 This is exactly the type of impact document one
20 would expect to see if Agri Stats were being used for
21 pricing opportunities, and that is indeed what we see from
22 the small number of documents that were produced.

23 On slide 28 we have outlined just a small number
24 of things from the initial disclosures which shows that
25 high level executives were designated to oversee the

1 relationship with Agri Stats and to oversee the
2 transmission of data to and from Agri Stats.

3 That is the level of importance that these
4 defendants ascribed to the Agri Stats reports, that they
5 would put such high level directors, treasurers, division
6 controllers in control of this relationship.

7 Your Honor, just briefly on the -- I'm finished,
8 unless Your Honor has any questions further on the rule of
9 reason or the per se?

10 THE COURT: I just had one question. Other than
11 participating in providing information to Agri Stats, are
12 there any other allegations against Indiana Packers?

13 MS. SCARLETT: Your Honor, I would have to go
14 back through the complaints in detail, but I believe in
15 large part, the allegations against Indiana Packers rest
16 with their participation in Agri Stats.

17 THE COURT: All right. That's what I thought.
18 Thank you.

19 MS. SCARLETT: Just briefly addressing Rule 9(b),
20 it's a very fact specific inquiry. Your Honor is more than
21 capable of addressing it, but it's whether or not these
22 claims sound in fraud. These are price fixing and supply
23 constraints antitrust claims. These are not consumer
24 allegations of deception of packaging or labeling. These
25 are the core critical antitrust claims.

1 Other cases have certainly found they do not
2 sound in fraud and have applied the same level of scrutiny
3 that Sherman Act claims have at the motion to dismiss
4 stage, but even if, Your Honor, even if you wanted to apply
5 the 9(b) standard, the plaintiffs here, the indirect
6 purchaser complaint alone is 177 pages.

7 It details timing of statements. It details who
8 said them. It details a large number of the Agri Stats
9 reports. There is sufficient allegations here to support a
10 9(b) complaint, even though the indirect purchasers and
11 other plaintiffs do not believe that it is appropriate at
12 this time.

13 Unless Your Honor has further questions on that,
14 I will cede the rest of my time to Mr. Pouya for the direct
15 purchasers.

16 THE COURT: Thank you, Ms. Scarlett.

17 Mr. Pouya?

18 MR. POUYA: Good afternoon, Your Honor, Bobby
19 Pouya for the direct purchaser plaintiffs. I will be
20 addressing defendants' statutes of limitations arguments.

21 Your Honor, defendants' statute of limitations
22 attacks on plaintiffs' complaints failed because plaintiffs
23 sufficiently alleged fraudulent concealment and the
24 continuing violation doctrine.

25 First, with respect to fraudulent concealment,

1 defendants' conspiracy did not take place in the light of
2 day. Rather, it was conducted in secret in order to
3 prevent discovery by the plaintiffs and class members, and
4 while this district has recognized that antitrust
5 conspiracies are inherently self-concealing in the *United*
6 *Power Association* case, we pled affirmative acts of
7 concealment in this case which would plead fraudulent
8 concealment under any standard, even the most stringent
9 standard that is applied in this district.

10 There is at least three acts of concealment here,
11 Your Honor. The first is the exploitation and exchange of
12 information through Agri Stats. As Ms. Scarlett went
13 through in her presentation, Agri Stats is a company that
14 exchanges information by the defendants for the defendants.

15 The plaintiffs and the class members did not have
16 any access to those reports or the information that is
17 exchanged therein, and in fact, the principles of Agri
18 Stats is predicated on confidentiality for persons outside
19 of the defendants while sharing that information, that
20 sensitive information, amongst the defendants themselves.

21 The reports that have been received from Agri
22 Stats in this case have been marked highly confidential by
23 the defendants, and the ones that are attached to the U P
24 complaint are still sealed, and defendants in their
25 presentation, Mr. Parker said that public -- Agri Stats was

1 public. Yes, they had a public website that made them look
2 like a farm and they, the fact that they are -- they exist
3 as an entity was disclosed.

4 But nowhere was it obvious that the information
5 that they were exchanging were to the level of degree that
6 has resulted in the actions here until at least 2017, and
7 simply calling Agri Stats a benchmarking service provides
8 nothing to the public to provide them with that information
9 and put them on notice that the information exchange list
10 was occurring here.

11 The other thing that defendants did was provide
12 pretext and justifications intended to prevent discovery of
13 the conspiracy, and again, this is not a conclusory
14 allegation. We alleged in the complaint that defendants
15 falsely attributed the rising pork prices and the stability
16 in the pork market to things such as good programs with our
17 retailers and lower grain costs, rather than the
18 conspiratorial acts.

19 They attributed the stabilization in capacity to
20 rumors that China was going to purchase more corn rather
21 than the conspiracy. They claimed that heat waves and
22 drought and feed prices were the reason behind pork prices
23 increasing rather than the conspiracy, and we further
24 allege that defendants took advantage of industry meetings
25 as opportunities to collude in order to avoid detection.

1 And again, this is not a summary allegation. We
2 allege in detail the industry associations that were
3 involved, the meetings that took place, the persons from
4 defendants that participated in those meetings and our
5 allegation that they were exploited in furtherance of the
6 conspiracy.

7 So in viewing whether these affirmative acts are
8 sufficient to establish fraudulent concealment, I believe
9 that two summary judgment decisions are appropriate to look
10 at and enlightening, and one was the *In Re: Monosodium*
11 *Glutamate* case which Mr. Parker decided.

12 If you look at that case, that was a summary
13 judgment decision by Judge Magnuson who also decided *In Re:*
14 *Milk*, and if you look at the allegations in that case that
15 went past summary judgment in terms of fraudulent
16 concealment, it was communicating by phone so as not to
17 leave a paper trail, falsifying travel and expense reports,
18 using secret codes, orchestrating price increases to avoid
19 arousing customer suspicions and giving false reasons for
20 price increases.

21 The allegations of fraudulent concealment that
22 got the plaintiffs past summary judgment in *Anderson versus*
23 *Dairy Farmers of America* which this court decided in 2010
24 were even more scant. The Court said, The evidence of
25 fraudulent concealment is someone weak, and all that got

1 the plaintiffs past summary judgment was an allegation that
2 the defendant attributed the purchase of cheese that they
3 were using to manipulate milk prices to legitimate
4 purchases that they needed.

5 So in this case, even though we're only at the
6 motion to dismiss stage, we believe we have more than that,
7 and we have alleged affirmative acts to establish
8 fraudulent concealment by the defendants. The other issue
9 here is inquiry notice, whether plaintiffs were on inquiry
10 notice to discover and take affirmative acts to discover
11 defendants' conduct.

12 The defendants claim that plaintiffs were on
13 inquiry notice regarding defendants' unlawful acts because
14 the alleged conspiracy -- conspiratorial acts were public.
15 If this was the law, it would be impossible to establish
16 fraudulent concealment because all complaints are
17 inherently derived from publicly available information.

18 The Eighth Circuit expressly rejected this
19 standard in the *Great Rivers Cooperative* case. It states
20 that courts in this district cannot automatically impute
21 plaintiffs' constructive knowledge of any information
22 available to the public, including all articles published
23 on and the publicly available records to the plaintiffs.

24 Instead, *Great Rivers Co-Op* states that inquiry
25 notice is an objective standard which requires some storm

1 warnings that would alert a reasonable person of the
2 possibility of misleading information. So the question is,
3 What were the storm warnings here?

4 I believe the defendants said it best in their
5 presentation on slide 4. There is no eureka moment here.
6 We agree. There is no one public source of information
7 which placed plaintiffs on notice regarding the existence
8 of an antitrust conspiracy. There was no publicly
9 disclosed DOJ, FTC or enforcement action. There is no
10 other lawsuit on file alleging similar allegations in the
11 pork industry.

12 The defendants' production statistics were not
13 easily accessible, and the complaints as well pled as they
14 are, they are derived from numerous different sources, not
15 one source, not one thing that would excite the reasonable
16 consumer, the reasonable purchaser of pork, and absent
17 that, the plaintiffs aren't required to do what defendants
18 ask them to do, which is compile pricing data and analyze
19 it using expert witnesses or listen in on earnings calls
20 and review SEC filings just because they happen to be
21 publicly available.

22 And with respect to Agri Stats, plaintiffs didn't
23 even have access or know what kind of information was being
24 exchanged until at least 2017. The other thing that
25 defendants have done is, they have attacked the two

1 articles, the Bloomberg article from February 2017 and the
2 UP second amended complaint in *Broilers*, which we allege
3 would be the first indication that something was awry, at
4 least as it relates to Agri Stats.

5 Even those documents, they relate primarily to
6 chicken. We agree. They do relate primarily to chicken,
7 and the fact that that is the closest thing we have to an
8 eureka moment here indicates how little there was in the
9 public record. So that fact, the fact that they did relate
10 to chicken, would not support defendants' argument. It
11 would just mean there was nothing before we filed our
12 lawsuit to put us on inquiry notice.

13 Turning to the continuing violation doctrine,
14 which the defendants are not -- now attempting to call the
15 continuing conspiracy doctrine, the continuing violation
16 doctrine as this court held in *Propane I* in 2017 does not
17 require conspiratorial acts during the statute of
18 limitations period.

19 All that it requires is that product that was the
20 subject of the conspiracy be sold at inflated prices.
21 *Propane I* held at footnote 2, "Because continued sales at
22 super competitive prices are overt acts under the
23 continuing violations doctrine, this court need not address
24 plaintiffs' allegations that defendants' conspiratorial
25 communications about pricing and full levels were

1 additional overt acts sufficient to invoke the theory."

2 So even if you take defendants' perspective as
3 true and they say, this is, this conspiracy is limited to
4 supply restrictions, and those ended in 2013, we don't
5 agree with that, but even taking it as true, the continuing
6 violations doctrine would apply because there was products
7 sold at artificially inflated prices thereafter as a result
8 of that conduct.

9 THE COURT: So --

10 MR. POUYA: This is again [indiscernible due to
11 audio interruption] allegation.

12 THE COURT: Mr. Pouya, I have a question. So
13 assuming that affirmative acts to reduce supply stopped at
14 some point in time because of the increase in supply that
15 is shown in the data, are there cases that support the
16 argument that a continuing violation can be adequately
17 pleaded by simply sharing information?

18 MR. POUYA: Well, the case law that would
19 interpret it, I believe you're talking about Agri Stats
20 which is the foundation --

21 THE COURT: Yes.

22 MR. POUYA: Yes. Not only the rule of reason
23 claims but the per se claims. So to the extent that those
24 were acts in furtherance of the conspiracy, those are
25 overt, additional overt acts in furtherance of the

1 conspiracy, the conspiracy would therefore still be in
2 effect, and everything sold during that period would be
3 subject to, would be part of the conspiracy.

4 But I don't even think the Court needs to get
5 there because even if you take defendants' perspective that
6 the overt conspiratorial acts ended in 2013, which we don't
7 agree with, the impact on prices continued thereafter, and
8 again, this is not a conclusory allegation.

9 It's reflected in the fact that we have alleged
10 specific facts regarding the pork production cycle and the
11 effect that cuts have over a long period of time on prices,
12 and that's at paragraphs 50, 70 and 71 of the DPP
13 complaint.

14 As Ms. Scarlett showed in her presentation
15 earlier today, we have also analyzed prices before and
16 after the conspiracy, and that analysis shows that the
17 pricing impact of the conspiracy continued through the
18 present, and those allegations, again, are specific in the
19 complaints.

20 With regard, turning back to your question again,
21 Your Honor, with regard to acts that continued after 2013,
22 it's undisputed that defendants continued to exchange
23 information through Agri Stats through the present. That
24 conduct has not stopped, and that conduct is central to our
25 claims.

1 Also as Ms. Scarlett pointed out, we do not
2 simply allege that the conspiracy is one to decrease
3 supply. It's one to stabilize supply, and we have also, we
4 believe, established that the supply was restrained and did
5 not recover in a manner that it would have but for the
6 conspiracy due to the defendants' conspiratorial conduct.

7 That's all I have for my presentation, Your
8 Honor, unless you have any further questions.

9 THE COURT: No. That is fine.

10 Who is next?

11 MR. FINLEY: Good afternoon, Your Honor. This is
12 Blaine Finley for the commercial and institutional indirect
13 purchaser plaintiffs, and I will be addressing the issue
14 regarding Article III standing and class certification.

15 THE COURT: All right. Thank you. Go ahead,
16 Mr. Finley.

17 MR. FINLEY: And so this issue is fundamentally
18 an issue of representative litigation, which is to say,
19 with these named plaintiffs that have brought claims, can
20 they also bring claims on behalf of absent class members,
21 and this question is present both with regard to absent
22 class members in the same state and in other states.

23 In other words, this distinction that defendants
24 draw is ultimately a distinction without a difference in a
25 situation like this one, and this question because it

1 relates to representative litigation is most appropriately
2 addressed first and foremost under Rule 23 and the
3 standards that it sets forth at the class certification
4 stage of their case.

5 And so if you go to the presentation, the Power
6 Point presentation of the defendants on this issue, they
7 essentially ignore *Amchem* and *Ortiz*, and I suggest that the
8 holding in those cases that class cert can be logically
9 antecedent to standing doesn't apply in a situation like
10 this.

11 However, in my group's briefing on this subject,
12 there are numerous District Court opinions that have
13 interpreted those two Supreme Court opinions to allow
14 courts to defer a decision on standing until class
15 certification, and in fact, one of those opinions *Roth v.*
16 *Time Life Fitness* was written by Your Honor.

17 And in general, there has, I would say, there has
18 been a movement toward deferring standing determinations
19 until class certification in circuits across the nation.
20 There is an opinion cited in my group's briefing *In Re:*
21 *Carrier IQ, Inc.*, and it collects District Court opinions
22 under the circuits, the Second and Ninth, that reach
23 similar results to what plaintiffs advocate here.

24 In addition, commercial indirect's briefing cites
25 to *In Re: Asacol*, which is a First Circuit opinion that

1 suggests that it is appropriate in the antitrust class
2 action context to defer a determination on standing until
3 class certification, and so then why is deferring a
4 determination on standing appropriate in this particular
5 case?

6 And a major answer to that is that the
7 allegations in this case are with respect to a nationwide
8 conspiracy. The scope and effect of the alleged conduct
9 are alleged to be nationwide. The effect is alleged to be
10 uniform as well.

11 And another point to consider is that it would be
12 an odd result to determine standing now and say we're
13 taking these claims out of the case because the commercial
14 indirect named plaintiffs in this case are already bringing
15 nationwide federal injunctive claims under the Sherman Act
16 on behalf of absent class members from states where there
17 isn't currently a named plaintiff in this litigation.

18 So the situation would be, the current named
19 plaintiffs would be representing some of the claims but not
20 the damages claims, and it's arguably an absurd result or
21 it would be. As far as some of the cases the defendants
22 have cited, I would like to take a brief minute or two
23 treating those.

24 In *Insulate*, the entire matter was going away
25 anyways on the basis of *Twombly*, and so language in that

1 case about not deferring standing is dicta in the view of
2 the plaintiffs. In *McAteer v. Target Corp.*, all of the
3 claims were ultimately dismissed for a number of reasons,
4 for reasons that did not necessarily have to do with
5 standing.

6 Among others the Court mentions, indicated, that
7 some of the claims were, constituted nonactionable puffery,
8 and *Ferrari v. Best Buy Co.* is a consumer products case
9 where the named plaintiff bought one type of television,
10 and there might have been issues about whether the named
11 plaintiff only relied on a subset of the advertising that
12 was put out into the market by defendants.

13 And so factually or as far as the ultimate
14 outcome, these cases don't necessarily speak directly to
15 this issue of whether and when it is appropriate to defer
16 the decision on standing, and then as my second defined
17 matter, commercial indirects would pose the question, what
18 is gained by deciding standing now before the class
19 certification stage at which it is appropriate to decide
20 standing?

21 A likely outcome would be a number of new named
22 plaintiffs in a random motion to dismiss briefing. That
23 would be the cost, but what is gained is unclear,
24 especially in a case like this where what is at stake is a
25 nationwide antitrust conspiracy.

1 And as a final matter I will note that in
2 defendants' presentation there is a bullet point about
3 *Illinois Brick*, and as I recall, *Illinois Brick* was not in
4 their briefing with respect to this Article III standing
5 class certification issue, and in addition, counsel did not
6 elaborate on this issue, and I'm not sure it's properly
7 before the Court for that reason.

8 That's all I have, unless Your Honor has
9 questions.

10 THE COURT: No. That's fine, Mr. Finley. Thank
11 you.

12 Who is next?

13 MR. BATES: Good afternoon, Your Honor. Kyle
14 Bates for the Commonwealth of Puerto Rico, and I will be
15 addressing defendants' Puerto Rico specific arguments.

16 THE COURT: All right. Thank you.

17 MR. BATES: Your Honor, turning to *parens patriae*
18 standing, I want to raise the background presumption from
19 the Supreme Court which the defendants did not address in
20 their presentation today, and the *Snapp versus Puerto Rico*
21 decision which is cited on page 18 of our brief quotes
22 that, "The prerogative of *parens patriae* is inherent in the
23 supreme power of every state."

24 So that's the background presumption about
25 actions by states in their capacity as *parens patriae*, and

1 there are two avenues to pursuing claims in the capacity of
2 *parens patriae*. One is by express statutory authority, and
3 the other is by satisfying the multi factor test in the
4 *Snapp* case.

5 And here there are -- the language of the statute
6 that confers *parens patriae* authority to Puerto Rico in
7 this case, which is cited on page 19 of our opposition, is
8 32 LPRA 3341 which says that the Commonwealth
9 of Puerto Rico through its agencies, dependencies and
10 instrumentalities in their capacity of *parens patriae* may
11 file a class suit on behalf of consumers for damages.
12 That's what the statute says.

13 THE COURT: Why does the statute say class suit
14 there? I'm not sure whether a Commonwealth or a state can
15 file a class suit. What do you think that means?

16 MR. BATES: Your Honor, we think it means a
17 representative suit as opposed to a class action, which is
18 a term of art in federal jurisprudence under Rule 23. The
19 *LG Display versus Madigan* case, which is cited on page 20
20 of our brief which is a Seventh Circuit decision from 2011,
21 it goes into detail about the difference between a *parens*
22 *patriae* case and a class action.

23 And on page 772 of that decision, the court said,
24 The class action must be brought by a representative
25 person, a class representative, as opposed to an attorney

1 general which is who brings this case, and there are other
2 Rule 23 procedural requirements like adequacy, typicality
3 and commonality that are required to be met in a class
4 action that are not required to be met in a *parens patriae*
5 action like this one.

6 And that's what the Seventh Circuit held in *LG*
7 *Display*. It's what the Fourth Circuit held in *CVS*
8 *Pharmacy*. It's what the Ninth Circuit held in *Chu Mei*
9 *Intellects Corporation* [phonetic]. Defendants don't
10 address any of those instances. They simply substitute the
11 phrase "class action" for "class suit."

12 In fact, Your Honor, the *Cardizem* case which is
13 cited on page 19 of our brief, it is 218 F.R.D. 508,
14 interpreted this exact statute, Section 3341, and held that
15 Puerto Rico, along with 13 other attorneys general were,
16 "Expressly conferred *parens patriae* authority."

17 So for those reasons, Your Honor, we respectfully
18 submit that Puerto Rico does have express statutory
19 authority to proceed as *parens patriae*. Even so, Your
20 Honor, Puerto Rico satisfies the *Snapp* factors. *Snapp* only
21 requires that Puerto Rico show that it has a quasi
22 sovereign interest in the claims at issue.

23 And by that, Puerto Rico needs to show that it is
24 not, "Only a nominal party without a real interest," and
25 Puerto Rico clearly has its own interest in this case which

1 were evident by the damages it seeks for its other counts.

2 And furthermore, courts, including this district,
3 have repeatedly held that a state maintains a quasi
4 sovereign interest either where the health and well-being
5 of its citizens are affected or where the state works to
6 ensure that its residents enjoy the full benefit of federal
7 laws, and that's *Minnesota by Humphrey versus Standard Oil*,
8 568 Federal Supplement 556, this court's decision of 1983.

9 In the *Standard Oil* case this district assessed
10 Georgia's antitrust case that it brought about price fixing
11 in the rail freight market, and this court concluded that
12 if Georgia properly brought a claim under *parens patriae*
13 because it had a quasi sovereign interest in ensuring that
14 its residents had access to properly priced rail freight.

15 And defendants' only argument that Puerto Rico
16 doesn't satisfy the *Snapp* factors are that pork is not an
17 appropriately important aspect of Puerto Rico's culture,
18 and we submit that rail freight is probably not a
19 significant feature of Georgia's culture, but nevertheless
20 ensuring, it is clearly a quasi sovereign interest in
21 ensuring that Puerto Rico's citizens are protected and that
22 they enjoy the full protection of federal law.

23 So for those reasons we contend that Puerto Rico
24 satisfies the *Snapp* factors. Unless Your Honor has other
25 questions, I will move on to Section 259.

1 THE COURT: That's fine. Go ahead.

2 MR. BATES: As defendants noted during their
3 presentation, Puerto Rico is seeking injunctive relief, and
4 there is not a dispute about that. At this point, as you
5 can see from the parties' papers, defendants' argument
6 about the deficiencies of Puerto Rico's claim under Section
7 259, to the extent that they are not subsumed within
8 defendants' larger *Twombly* arguments, are that Puerto Rico
9 hasn't complained of an unfair practice, and that's just
10 not true.

11 Your Honor, you heard from Ms. Scarlett earlier
12 today. There was coordination among vertically integrated
13 coconspirators, and you heard from Mr. Pouya that the Agri
14 Stats conspiracy was created for defendants by defendants
15 literally to share price sensitive information with each
16 other that wasn't to be shared by anybody who wasn't in the
17 club, and that's the definition of an unfair or deceptive
18 act and practice. Those are alleged all throughout
19 plaintiffs' complaint, as you heard from my colleagues
20 earlier today.

21 Moving on to Puerto Rico's claim under Section
22 260, Your Honor, the inquiry that is before the Court today
23 concerns Puerto Rico, the sufficiency of Puerto Rico's
24 allegations regarding defendants' intent to monopolize. A
25 claim for conspiracy to monopolize has three elements,

1 which are set out on page 7 of our brief, and the first two
2 of those elements are subsumed in a Section 1 claim, which
3 defendants don't dispute.

4 They admit that on page 5 of their reply, which
5 is at ECF 116, and so assuming that the sufficiency of
6 plaintiffs' Section 1 claim proceeds, all that is left for
7 the Court to consider in considering Section 260 are the
8 specific intent to monopolize, and defendants argue that
9 Puerto Rico hasn't made any allegations about market power
10 or the intent for defendants to monopolize.

11 Again, that's just not what the complaints say.
12 Paragraph 35 of Puerto Rico's complaint says that beginning
13 in at least 2008, Agri Stats began to propose a series of
14 benchmarks to the swine industry along the lines of the
15 benchmarks use to restrain competition in the broiler
16 industry.

17 Paragraphs 35 and 36 talk about how Agri Stats
18 marketed this benchmarking club to everyone in the
19 industry, and in 2008, Greg Bilbrey of Agri Stats said that
20 each and every commercial swine operation is encouraged to
21 participate in some benchmarking effort, and that's
22 plaintiffs' complaint at paragraph 36.

23 The market power of defendants is addressed
24 throughout all of the plaintiffs' complaint. In this case,
25 specifically in Puerto Rico's complaint, it's discussed at

1 paragraph 78 where it talks about the top four pork
2 integrators, Smithfield, Tyson, JBS and Hormel, increasing
3 their market share by almost double by 2015 and that the
4 top eight pork integrators had a market share exceeding 80
5 percent during the relevant time period, and Ms. Scarlett
6 mentioned that as well, but it is in paragraph 82.

7 THE COURT: The same question I asked earlier.
8 How are competitors impacted? Wouldn't their prices or the
9 amount of money they got for their product have increased
10 as well? So how is there a monopolization?

11 MR. BATES: Your Honor, defendants claim that
12 exclusionary conduct is somehow an additional element of a
13 Section 2 claim, and while monopolization can exclude
14 rivals, it certainly doesn't have to exclude rivals.
15 Competitors can be incidental beneficiaries of a
16 conspiracy.

17 What matters for the antitrust laws is harm to
18 competition, not harm to competitors, and that's the
19 Supreme Court in *Brunswick Corporation versus Pueblo*
20 *Bowol-O-Mat*, 429 U.S. 477. So the fact that competitors
21 may have incidentally benefitted from a conspiracy they
22 weren't a part of doesn't mean there wasn't a conspiracy to
23 monopolize under Section 2 or Section 260.

24 And with that, Your Honor, I will sit down unless
25 you have additional questions.

1 THE COURT: I don't. Is there any other argument
2 for the plaintiffs?

3 MR. AHERN: Your Honor, this is Patrick Ahern for
4 the Winn-Dixie plaintiffs. I don't know if -- I'm being
5 heard. I don't know if I'm being seen. I don't need to be
6 seen.

7 THE COURT: You're both being heard and seen,
8 Mr. Ahern.

9 MR. AHERN: All right. Just about four points,
10 Your Honor. The first one is just calling Your Honor's
11 attention to two different parts of our complaint, and I
12 think these are mirrored in the complaints of the other
13 plaintiffs.

14 In paragraph 148 there is an allegation that
15 Tyson and Smithfield announced cuts on the very same day,
16 July 25th, 2009, and I just wanted to make sure that the
17 Court had that in mind. In paragraph 128, there is an
18 allegation that in June of 2014 that Hormel announced that
19 it was reducing capacity at its Los Angeles plant.

20 The second point, Your Honor, relates to the
21 statute of limitations. I think there are two things
22 important here. A continuing violation can be a continuing
23 harm. It doesn't have to be an overt act, and this is
24 exactly what *Hanover Shoe* says at page 502. *Hanover Shoe*
25 is 392 U.S. 481.

1 At 502, footnote 15, the Supreme Court says, A
2 continuing violation of the Sherman Act which inflicted
3 continuing and accumulating harm, and the distinction
4 between the continuing and accumulating harm and the overt
5 act was picked up by the Eleventh Circuit in the *Morgan's*
6 *Market* case, 198 F.3d at 828.

7 We think that this is an important issue when it
8 comes to what Mr. Pouya mentioned in terms of reductions in
9 supply in this type of a setting. I just litigated this
10 issue in *Winn-Dixie versus Southeast Milk* in connection
11 with a program that was challenged reducing the herds of
12 dairy cows, and there is a lasting effect of these types of
13 reductions in supply.

14 And that's just something we wanted the Court to
15 be aware of, and as Mr. Pouya said, there are allegations
16 in the complaints that relate to this.

17 The second point about continuing violation is,
18 it is often analyzed in the context or with, along with the
19 issue of withdrawal of the conspiracy. If Your Honor
20 believes or finds that there are adequate allegations for a
21 production, a conspiracy to reduce production and supply
22 through 2013, then the defendants must affirmatively show
23 that they withdrew from the conspiracy, and this is
24 important. This adds added importance to the use of Agri
25 Stats.

1 Obviously the defendants have not shown that
2 here. Probably on a motion to dismiss that's not
3 surprising because this is an intensely factual issue, but
4 in, once again, in the *Winn-Dixie versus Southeast Milk*
5 case, the Court dealt with both the issue of continuing and
6 accumulating harm, along with the issue of withdrawal, and
7 found that on summary judgment that was a factual issue.

8 The third point, Your Honor, is that -- the third
9 point was relating to the impact of a reduction in supply
10 that has a lasting effect, and I think I covered that. The
11 fourth point, Your Honor, is that we allege that Agri Stats
12 was used to carry out the conspiracy.

13 Included in that is policing and monitoring the
14 conspiracy, and in the absence of the defendants indicating
15 that they withdrew from the conspiracy, Agri Stats
16 continued to be used and continued to be used to monitor
17 and police the conspiracy, both with respect to prices and
18 with respect to the reduction in production or to hold
19 production stable when prices increased.

20 If Your Honor doesn't have any questions, that's
21 all I have.

22 THE COURT: That's all. Thank you, Mr. Ahern.
23 Anyone else from the plaintiffs?

24 Okay. If not, we will switch to any reply by the
25 defense, but I'm going to take a short break here. This is

1 the time of our weekly call for all of our staff to call in
2 to bring them up-to-date on what is going on with our
3 response to the virus. That only takes about five to seven
4 minutes or so, so I will be right back. So stay on.

5 MR. NEUWIRTH: Thank you, Your Honor.

6 **(Recess taken.)**

7
8 **(In open court via video conference.)**

9 THE COURT: All right. Who is going to be first?

10 MR. NEUWIRTH: Thank you, Your Honor. Stephen
11 Neuwirth. I will be speaking first, and I'm going to be
12 responding on the federal Sherman Act claims.

13 THE COURT: All right.

14 MR. NEUWIRTH: Thank you. Your Honor,
15 Ms. Scarlett started with two overarching points. The
16 first was her concern that defendants were purportedly
17 relying on documents outside of the complaint. Nothing
18 could be further from the truth. Every single document I
19 spoke about today was a document that was quoted from,
20 cited or attached to the complaint.

21 As you will see in our argument binder, every
22 single document referenced had a citation to the complaint,
23 the paragraph where it appears. The charts that we showed
24 you are charts obtained from plaintiffs' own complaints.

25 We gave you the paragraph numbers, and we showed

1 you the case law, including your own opinion from 2013,
2 that documents cited and embraced in the complaint are
3 appropriate to consider on a motion to dismiss, and once
4 they are in the complaint, the plaintiffs can't cherry-pick
5 from those documents and try to characterize them in ways
6 that are inconsistent with what the documents actually say.

7 COURT REPORTER: Mr. Neuwirth, I am sorry. This
8 is the court reporter. For some reason you are very
9 distorted. I think it is because you are actually kind of
10 animated and you are moving around a little bit. If you
11 could maybe try to sit still. Let's see if that will work.
12 Okay?

13 MR. NEUWIRTH: Thank you, Madam Court Reporter.

14 COURT REPORTER: And I ended with, "Inconsistent
15 with what the documents actually say."

16 MR. NEUWIRTH: Thank you for your guidance on
17 this.

18 The second point that Ms. Scarlett made was to
19 focus even more heavily on the President's executive order
20 from April 28th, 2020. It's critical that the text from
21 that order that the plaintiffs seek to highlight from page
22 5, even accepting everything it says as true, says nothing
23 more than the [indiscernible due to audio malfunction] can
24 have an impact on supply.

25 That's it, and in fact, the language that is in

1 quotes there, the only example has to do with meat
2 processing facilities. The word "pork" does not appear in
3 any of this text. This document says absolutely nothing
4 about whether [indiscernible due to audio malfunction] is
5 the critical issue at this stage, whether the plaintiffs
6 can show parallel conduct.

7 This document has nothing to do with parallel
8 conduct. Absolutely nothing. It's not even suggested
9 here, and it's well understood that the actual emergency
10 the document refers to is the health crisis in these meat
11 facilities that the company and the government are both
12 trying to address. This is beside the point completely.

13 Now, turning to the substance of the argument,
14 there is a great sense of déjà vu today not only because
15 the new complaints are so similar to the original
16 complaints in their deficiencies, but so much of the
17 plaintiffs' argument is literally a repetition of what was
18 said the last time around, reintroducing materials that
19 this Court already considered and found insufficient to
20 solve the problem of the lack of parallel conduct.

21 In the plaintiffs' book, tab 6 has a chart
22 showing average spreads, two columns, average spreads.
23 This chart was in the original complaints. This chart was
24 discussed at the last hearing, and it was not deemed
25 sufficient to prove anything.

1 Your Honor pointed out in your opinion that this
2 type of [indiscernible due to audio malfunction]
3 information sheds no light on whether there is any parallel
4 conduct in this case. The charts at tab 7 are also not
5 new. These two charts related to Tyson and Smithfield's
6 revenues and costs were both in the original complaints.

7 They were specifically talked about at the last
8 hearing on page 49 of that transcript, and these charts not
9 only say nothing about the vast majority of the defendants,
10 but they also prove nothing. All that they prove is what
11 was the relationship between revenues and costs.

12 That tells us nothing about what was happening to
13 prices as a relative matter, and it certainly tells us
14 nothing about whether these two defendants were doing
15 anything in parallel with anyone else.

16 Now, plaintiffs spend some substantial time
17 trying to assert that parallel conduct does not have to be
18 in lockstep. The problem is, they're not even close to
19 being parallel by any measure. Even their time line, which
20 we will look at in a minute, just has sporadic instances of
21 what they try to characterize as supply cutting activity.

22 And a lot of what's on that chart are literally
23 the public statements that Your Honor's last opinion said
24 were insufficient to establish anything sufficient for this
25 complaint to survive on a motion to dismiss.

1 But if you look at tab 8 in our binder, the cases
2 that the plaintiffs themselves cite show that the type of
3 parallel conduct that's necessary is not absent here. In
4 the *Broiler Chicken* case, it was alleged that all the
5 defendants had production cuts at the same time. In the
6 *Kleen Products* case, there is uniform and simultaneous
7 supply restrictions and price increases.

8 In the *SD3* case, the changes occur within a
9 period of months, and it was done by each of the
10 defendants. The *Blood Reagents* case, near pattern of price
11 reducing in close proximity. The *Interest Rates Swaps*
12 case, identical demands on the same day. The *Chocolate*
13 case, immediate price increases within two days or within
14 two weeks of each other.

15 Your Honor, there is nothing remotely close to
16 that here, and the timetable of events that the plaintiffs
17 have given you on pages, on the pages of their book are
18 shocking in the extent that they are just repeating what
19 they did last time. The chart of 2008 to 2009 includes an
20 allegation which says that in February 2009 Hormel stated
21 that it looked for opportunities to reduce production.

22 You at page 9 of your order [indiscernible due to
23 audio malfunction] specifically addressed that statement
24 and said it is not sufficient to count to establish
25 parallel conduct. That is just one example.

1 On the chart for 2009 and 2010, a statement in
2 August 2009 by JBS, a statement in August 2009 by
3 third-party Steven Meyer, September 2009 statement by the
4 CEO of Smithfield were all addressed in your last opinion,
5 and you said in all of those that they were not sufficient,
6 that they were just general statements about what was
7 happening in the marketplace.

8 None of these allegations are new. The March
9 2009 statement by JBS was in the original complaint. All
10 they have done here is put together on a chart materials
11 that this Court has already rejected, and the chart for
12 2013, you asked what could you show besides -- what you
13 asked the plaintiffs, what allegation did they have post
14 2011 besides a single allegation about JBS in 2013.

15 And all they could point you to was a single
16 reported sales price decrease for Tyson in 2013 and an
17 allegation that it decreased its capacity in response.
18 That's it. The entire period after 2011, that's it. That
19 is not parallel conduct by any measure, and the only other
20 things on that chart are statements by Hormel and Seaboard
21 in that year that they had lower sales volume, but lower
22 sales volume doesn't mean lower output.

23 It doesn't mean anything other than that you sold
24 less, and remember as we showed you and Ms. Scarlett did
25 not address, the plaintiffs admit that in 2013 there was a

1 PEDv virus that was affecting pigs. It was affecting that
2 whole industry, and so the fact that certain defendants may
3 have reported lower sales during that period is completely
4 consistent with that statement in the complaint.

5 Now, slide 12 starts with a line that had dots
6 and a line. This is the chart we showed you which shows
7 that output actually increased over the conspiracy period,
8 and defendants' response is to draw a line through it and
9 say, well, output could have been even higher.

10 The problem is, they showed you this exact same
11 chart at the last hearing, and we made the exact same
12 complaint about it that we would make now, that this
13 drawing of a line with what sales could have done is
14 totally arbitrary. There is no reason why they don't
15 connect the first dot and the last dot.

16 They could have covered a lot more dots on this
17 chart had they made the line more [indiscernible due to
18 audio malfunction]. They chose not to do that, but again,
19 it's exactly what we looked at in the last hearing. At tab
20 14, once again, more aggregated data, exactly what Your
21 Honor said in your opinion was insufficient to show
22 parallel conduct.

23 Now, the plaintiffs also spent much more time
24 talking about plus factors than talking about parallel
25 conduct. I believe that other than answering your question

1 about post 2011 conduct, the plaintiffs spent no time
2 demonstrating that there was parallel conduct whatsoever.
3 They spent much more time talking about plus factors.

4 But as Your Honor noted in your last opinion,
5 Your Honor spent a portion of that opinion talking about
6 the plus factors that Your Honor found compelling, but Your
7 Honor said in the absence of a threshold showing of
8 parallel conduct, those plus factors are not enough to
9 allow a case to survive a motion to dismiss.

10 You can't have plus factors when there is no
11 underlying parallel conduct, and that holding was
12 completely consistent, as we show behind tab 35, with the
13 Eighth Circuit's 2018 holding in the *Posterman* case, and
14 you discussed this issue on page 7 of your last order.

15 Our book from page 35 to 40 talks about the
16 different plus factors, but the plus factor that was
17 focused on here were public statements, and these public
18 statements are the same type of public statements that Your
19 Honor felt last time were insufficient to prove anything.
20 What is truly remarkable as well is the chart that the
21 plaintiffs showed at tab 18 of their book, which they say
22 demonstrates abnormal pricing.

23 This chart is remarkable for several reasons.
24 First, we told you in our opening statement, our opening
25 presentation today, that the plaintiffs [indiscernible due

1 to audio malfunction] 2009 as the start of the class period
2 and that to the extent they want to bring in examples from
3 2008, it contradicts their complaint. This chart that you
4 were shown by Ms. Scarlett has a bright line saying that
5 the start of the class period is January 2009.

6 This chart purports to compare what happened to
7 pricing after 2009 with what happened before. For the
8 plaintiffs to now say we should also look at conduct in
9 2008 to show parallel conduct doesn't reconcile with that.
10 What this chart on pricing actually shows is that the two
11 spikes that occur are spikes in 2010 and spikes in 2013 and
12 '14.

13 And the complaints themselves show Your Honor
14 that that was during the Great Recession, during pig
15 disease in 2010 and during terrible pig disease in 2013 and
16 2014, which had a devastating impact on supply. That is
17 not outside the complaint. It's in the complaint, and Your
18 Honor spoke expressly about the pig disease in 2014 in your
19 last opinion quoting the original complaints.

20 All of those are repeated, and that's at our
21 slide 33 and 34. We include all of the places in the
22 complaint, paragraph 145, the DPP complaint; paragraph 147
23 of the DPP complaint; paragraphs 173, 149 and 164 of other
24 complaints. That is where all that information about the
25 Great Recession, the swine flu and then the PEDv virus are

1 all included here.

2 We are all living through a virus now, and we see
3 what it can do. When it runs rampant in the pig
4 population, it has a devastating impact on supply.

5 Now, on the data arguments -- I'm sorry. Before
6 I turn to the exchange of data, I just want to make one
7 other point. What the complaints also show us against the
8 sparse allegations of parallel conduct is that the
9 defendants actually increased capacity during this period,
10 which is consistent with the chart showing that the amount
11 of output actually went up.

12 As we show on tab 29, the complaints, the DPP
13 complaint and the IPP complaint, both allege that in 2012
14 Cargill, a purported coconspirator, spent 25 million
15 dollars to expand capacity. The DPP complaint at paragraph
16 163 says that in 2015, Seaboard and Triumph entered a joint
17 venture to construct a new pork processing facility, and
18 the facility opened in 2017.

19 And the DPP complaint at paragraph 92, the
20 Winn-Dixie complaint at paragraph 91, and the DPP complaint
21 again in paragraph 113 referencing pork show that Clemens
22 opened a new pork processing facility in 2017 and doubled
23 the processing capacity and doubled its market share.

24 So those allegations in the complaint render even
25 more devastating the absence of parallel conduct

1 allegations.

2 Now perhaps with -- I'm sorry, Your Honor?

3 Perhaps for this reason, Ms. Scarlett in her
4 argument and the plaintiffs in their papers are now
5 investing so much in this new claim of information
6 exchange, but listening to Ms. Scarlett's arguments
7 highlights what is wrong with this allegation.

8 There is no allegation anywhere in the IPP
9 complaint that the information that was exchanged ever
10 affected a price that any defendant set. You heard what
11 she said. She said phrases like, this information meant
12 that defendants could have raised prices.

13 She showed you that people at the companies paid
14 careful attention to the data that would have enabled them
15 to raise their prices, but that's not an allegation, that
16 the information was exchanged ever did raise their price.

17 In fact, what she showed you in her dec at page
18 23 was a chart that showed prices that were below the
19 average price, and she said this would allow someone to
20 figure out how they could have raised their price to the
21 average, but there is no evidence that ever happened.

22 The only evidence we have is that companies were
23 charging prices below the average price, and the very chart
24 she shows you shows great variation in price. She shows
25 you three prices that are \$10, \$9 and \$2 off the average.

1 This is the opposite of parallel conduct and the opposite
2 of what we need to be able to establish that information
3 exchanges had an effect.

4 In fact, as we show you at tab 50 of our book,
5 price uniformity is the key to these information exchange
6 cases. In the *Container Corp.* case from 1969 that the
7 plaintiffs cite, the court said that once a defendant had
8 this information, he quoted substantially the same price,
9 which meant matching that price.

10 In the *Todd versus Exxon* case by Justice
11 Sotomayor, the court expressly said that the information
12 that was exchanged allowed Exxon to adjust its salary
13 levels to maintain alignment and that each defendant used
14 the information to align its salary, not that they could
15 have, but there were specific allegations that they did,
16 and that is clear that that is exactly what is missing
17 here.

18 None of the quotes that you were shown showed
19 anything about what they actually did to affect prices.
20 Now, Ms. Scarlett and the plaintiffs in their papers try to
21 argue that the fact that the justice department has a
22 so-called safe harbor for information that is more than
23 three months old somehow solves their problem, but that's
24 not true at all, Your Honor.

25 As Your Honor knows, a safe harbor just means

1 that if information that is exchanged is more than three
2 months old, the justice department automatically will not
3 be concerned about it. That doesn't mean that in every
4 industry information that is less than three months old is
5 considered current. Nothing like that can be implied from
6 the justice department safe harbor.

7 The cases that the plaintiffs rely on make clear
8 that the information that is exchanged has to be the type
9 of information that can be currently used or used in the
10 future. *Todd v. Exxon* talked about current and future
11 prices and expressly distinguished pricing information that
12 was backward looking and said that that type of information
13 is the best type of information to exchange. It literally
14 said that.

15 Now, the *Haff* case also spoke about
16 contemporaneous information, and the judge there expressly
17 distinguished cases like *Maple Flooring* where these type of
18 information claims were rejected because what was exchanged
19 was historical transactions rather than current data, and
20 case law that we have cited makes clear that there is no
21 problem with exchanging the type of data that is exchanged
22 by Agri Stats in the abstract, that there can be many
23 competitive benefits to exchanging aggregated data on the
24 industry.

25 What's missing here is that there is nothing in

1 the complaint to show that the Agri Stats data was ever
2 used for any purpose that would have been improper, and in
3 fact, this is so highlighted in the plaintiffs' complaint,
4 tab 52 in our book. The IPPs have a figure 4 in their
5 complaint at paragraph 127. It's a chart showing spread
6 between what they call the high composite spread, which is
7 a change in two factors.

8 The spread that they show, as we highlight in our
9 brief and in their brief, only begins to separate in 2015,
10 but the allegation here is that the defendants started
11 using Agri Stats in 2009. There is no evidence even from
12 their composite charts that this information exchange was
13 making any difference whatsoever.

14 It's also troubling that on page 27 of their book
15 the plaintiffs have a chart which Ms. Scarlett showed you
16 which says, Defendants had regular meetings to identify
17 opportunities to raise price using Agri Stats reports, and
18 they cite paragraph 37 of their complaint.

19 What is troubling about this is that this is
20 written in a way to imply that the defendants were talking
21 to each other, that these were inter-defendant discussions.
22 Paragraph 37 doesn't say that at all, and the entire IPP
23 complaint doesn't say that at all. There is not a word in
24 that complaint about any sort of inter-defendant discussion
25 relating to the Agri Stats data.

1 This case, to the extent it's just not old wine
2 being poured out of new bottles, has nothing to meet the
3 criteria that Agri Stats [indiscernible due to audio
4 malfunction] for this case to survive a motion to dismiss.
5 Everything that you wrote in your original opinion on the
6 original complaint can be written about the new complaints,
7 not just because so much of the new complaints copy what is
8 in the old complaints, but anything that is new has the
9 same flaws as what Your Honor found last time.

10 Ms. Scarlett asked you for leave to amend if the
11 Court was not prepared to take judicial notice of the
12 executive order that was referenced earlier. There is
13 nothing in that executive order which is a basis to amend
14 the complaint.

15 The plaintiffs here have had two chances now to
16 give you a complaint to cure the deficiencies you
17 identified. We're at the point now where any further
18 amendments would be futile.

19 In the *Kent versus Bank of America* case in 2012,
20 Your Honor granted dismissal with prejudice because you
21 said, quote, "Plaintiffs have already amended their
22 complaint once, have not suggested how they would cure the
23 deficiencies of this pleading and have not pled facts that
24 would support the complaint."

25 Certainly there is nothing in the President's

1 executive order that remotely can solve the flaws in this
2 complaint. We've already expressed our concern about that
3 order even having been mentioned, but what it really
4 highlights is the absence of sufficient allegations here.

5 Thank you very much, Your Honor.

6 THE COURT: Thank you, Mr. Neuwirth. Let's see.

7 Mr. Parker, anything you would like to say? I
8 think we're on mute.

9 THE CLERK: It was me, Counsel. I've unmuted
10 you.

11 MR. PARKER: Okay. I'm good.

12 Your Honor, number one, I want to respectfully
13 request that you take pages 9, 10 and 11 of their dec and
14 add it to our dec because we will adopt that because what
15 that shows is that if you give them every benefit of the
16 doubt, there aren't any parallel activities after '13, even
17 if you give them every benefit of the doubt.

18 That means the statute ran in '17, and they were
19 approximately one year late, and if there isn't any
20 parallel activity after '13 from which to infer a
21 conspiracy, my client had nothing to withdraw from, with
22 all due respect.

23 Point number two is that there wasn't any eureka.
24 I was giving them the benefit of the doubt that they
25 actually learned something between, you know, '13 and '18

1 that they needed to know to file this complaint. They said
2 no, there isn't any eureka moment. I agree with that, and
3 the reason for that is that Agri Stats was not concealed
4 and that you can't conceal public statements.

5 You can't conceal them, and so if there was some
6 problem, when in their opinion does -- I'm asking this
7 rhetorically. I don't ask you questions, Your Honor. When
8 in their opinion does the statute start? I guess they say
9 it starts in '17 when they read the chicken article from
10 Bloomberg, but then they say they didn't learn anything,
11 and I agree they didn't learn anything because nothing was
12 concealed.

13 Final point, I want Your Honor, I refer you again
14 to our slide 6 and to page 51 of the direct purchaser
15 complaint that shows production going sky high, sky high,
16 and if there was an overt act that somehow kept it from
17 going double sky high, they probably ought to say what it
18 is, and it can't be Agri Stats passing out information that
19 doesn't even help on production.

20 They don't contend it helps on production, and
21 Agri Stats passing out six-week old pricing data, I think
22 you could lose a lot of money relying on six-week old data
23 in a commodity market.

24 Thank you, Your Honor. Unless you have any
25 questions, that will be all I have in rebuttal.

1 THE COURT: Thank you, Mr. Parker.

2 Mr. Duncan, did you have anything?

3 MR. DUNCAN: Very briefly, sir, checking through
4 the four points. I'm going to rest on the Article III
5 issue, the, on the decisions that we have cited and talked
6 about this morning about whether you can have standing to
7 bring claims under the law of a state you don't reside in
8 or purchase the product in.

9 We did not ignore *Amchem* and *Ortiz*. I read those
10 cases this morning. When I read them, I was struck by the
11 fact that the Supreme Court was dealing with an intractable
12 problem, which is massive asbestos class settlements, and
13 that's why the Court said we're going to address that issue
14 because the settlements are so obviously not certifiable.
15 We're going to put that in front of Article III, but the
16 courts clearly say this is not for everybody else to start
17 doing.

18 Mr. Finley says, well, what is gained by deciding
19 standing now? I'm trying to figure out a polite way to
20 tell this to the Court, so maybe I will just read a
21 sentence from Judge Frank, *McAteer versus Target* case. He
22 says, "Article III standing is an absolute requirement to
23 litigate in federal court."

24 So I don't think there is an ability to simply
25 decide to defer it, and honestly, why would we litigate

1 claims under the laws of 20 states when there is no one who
2 is even identified as being possibly injured under that
3 law? I mean, that's the essential issue that I don't think
4 plaintiffs can resolve.

5 Moving to Rule 9(b), I think I heard plaintiffs'
6 counsel state that they meet 9(b) standards because they
7 plead, for instance, the exchange of information through
8 Agri Stats with sufficient detail, but exchange of
9 information through Agri Stats is not fraud or deception.

10 So what's missing here in their complaint is,
11 there is no pleading of a statement by anyone to anyone
12 that is false and why it's false, and that's why their
13 consumer protection claims don't meet Rule 9(b).

14 Turning quickly to Puerto Rico *parens patriae*
15 standing, I think the whole thing can be answered by
16 looking at page 22 of Judge Gelpi's decision in the
17 *Carpentry Company* case that Puerto Rico presented to Your
18 Honor, and that's document 137 in the case. If you look at
19 the third amended complaint, there are two state law
20 claims.

21 There is the antitrust claim, which alleges
22 claims under Sections 258, 259 and 260 of the antitrust
23 act, and there is an unjust enrichment claim. The statute
24 that counsel says provides *parens patriae* jurisdiction or
25 claim, LPRA 3341, is not pled in the complaint.

1 It is not, so let's look at what Judge Gelpi says
2 about the claims that are pled in the complaint. "No
3 Commonwealth statute, nor Puerto Rico Supreme Court
4 precedent, explicitly provides for *parens patriae* standing
5 to present unjust enrichment claims," so that takes care of
6 that.

7 He then says, "No Commonwealth statutes directly
8 allow *parens patriae* standing for antitrust claims, as it
9 does for other civil claims." The statute that he
10 distinguishes from the antitrust claims that has no *parens*
11 *patriae* authority, I guess it's a consumer protection
12 statute of some kind, but Judge Gelpi says LP or PRLA Title
13 3341, that's what he cites in contradistinction to the
14 antitrust act to say there are some other statutes that do
15 have *parens patriae* authority, but there is no claim in
16 this case under that statute.

17 Finally Georgia against Pennsylvania Railroad,
18 that's an interesting case. I think it supports our view,
19 though, because the claim there was that shippers were
20 discriminating against Georgia specifically, making it more
21 expensive for Georgia shippers to get their goods to port.

22 That's like *Snapp* where the Puerto Rican workers
23 were being discriminated against because they were Puerto
24 Rican. All we have here from the Puerto Rico complaint is
25 that indirect purchasers are paying more for pork, which is

1 exactly the individual injury that has been alleged
2 elsewhere.

3 Finally on Section 259, I will rest on that. On
4 Section 260, it's absolutely true that exclusionary conduct
5 is an essential element of a claim of monopolization, an
6 attempt to monopolization, conspiracy to monopolize.
7 Spectrum Sports against McQuillan puts exclusionary conduct
8 as the key point in attempted monopolization.

9 *American Tobacco* has it in monopolization and
10 conspiracy, and again, I point Your Honor to the cases we
11 discussed there on slide 8. That's my argument. Thank
12 you.

13 THE COURT: All right. Thank you, Mr. Duncan.

14 I think we're ready to wrap up. Anything that
15 the plaintiffs need to say before we wrap up the hearing
16 today?

17 MS. SCARLETT: 30 seconds, Your Honor.

18 THE COURT: That's fine.

19 MS. SCARLETT: My learned colleague Mr. Neuwirth
20 argued that plaintiffs have not come forward with evidence
21 demonstrating the impact on prices from the Agri Stats
22 reports, and I think that one issue really tethers a lot of
23 the arguments here today, which is plaintiffs are not
24 required to have evidence.

25 We're at the pleading stage. What is to be done

1 is to look at the allegations of the complaint. Evidence
2 comes later after discovery and motions for summary
3 judgment and a trial.

4 The complaints clearly state, the indirect
5 purchaser complaint at paragraph 12, that Agri Stats had
6 the intended purpose and effect of increasing pork prices
7 to plaintiffs and class members. The direct purchaser
8 complaint at paragraph 52 says, The purpose of the Agri
9 Stats reports was profitability of the defendant companies,
10 and the impact was higher prices of pork for customers.

11 This is a motion to dismiss. The plaintiffs have
12 pled a plausible conspiracy, and we thank Your Honor for
13 your time.

14 THE COURT: All right. Anything else,
15 plaintiffs' lawyers?

16 MR. BATES: Your Honor, very briefly for Puerto
17 Rico, if I may?

18 THE COURT: Yes.

19 MR. BATES: Your Honor, Mr. Duncan in rebuttal
20 read you two sentences from Judge Gelpi's decision in the
21 *Carpenter* case. He didn't read you the sentence between
22 them which says, "Had the government timely filed this suit
23 and would have sought damages under the Puerto Rico
24 Antitrust Act, then it may have had *parens patriae*
25 standing."

1 THE COURT: All right. Thank you, Mr. Bates.

2 Thank you, Counsel, for your arguments this
3 afternoon. I appreciate it very much. Excellent. The
4 Court is going to take the motions under advisement and
5 will issue a written order as quickly as possible.

6 Again, my thanks for participating by video
7 today, and I appreciate the arguments. We'll be in recess.
8 Thank you.

9 **(Court was adjourned.)**

10 * * *

11 I, Kristine Mousseau, certify that the foregoing
12 is a correct transcript from the record of proceedings in
13 the above-entitled matter.

14

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17 Certified by: s/ Kristine Mousseau, CRR-RPR
18 Kristine Mousseau, CRR-RPR

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